

United States
Circuit Court of Appeals
For the Ninth Circuit

TWIN FALLS SALMON RIVER LAND &
WATER COMPANY, a corporation, SALMON
RIVER CANAL COMPANY, LIMITED, a cor-
poration, COMMONWEALTH TRUST COM-
PANY OF PITTSBURGH, TRUSTEE, and A. C.
ROBINSON,

Appellants,

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E. MOR-
GAN, J. E. POHLMAN, W. C. POND, JAMES
W. BEAUCHAMP, CARL WASHBURN and
HAROLD M. SIMS, in their own behalf and in be-
half of all persons similarly situated with them.

Appellees.

Filed

Transcript of Record

JAN 7 - 1916

F. D. Monckton,
Clerk.

*Upon Appeal from the United States District Court
for the District of Idaho, Southern Division.*

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*Upon Appeal from the United States District Court
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*In the District Court of the United States for the
District of Idaho, Southern Division.*

NO. 494—IN EQUITY.

A. E. CALDWELL, W. F. MIKESELL, V. E.
MORGAN, J. E. POHLMAN, W. C. POND,
JAMES W. BEAUCHAMP, CARL WASHBURN
and HAROLD M. SIMS, in their own behalf and
in behalf of all persons similarly situated with
them, *Complainants,*

vs.

TWIN FALLS SALMON RIVER LAND &
WATER COMPANY, a corporation, SALMON
RIVER CANAL COMPANY, LIMITED, a cor-
poration, JOHN M. HAINES, W. L. GIFFORD,
GRACE SHEPERD, JOSEPH H. PETERSON
and FRED L. HUSTON, constituting the STATE
BOARD OF LAND COMMISSIONERS OF THE
STATE OF IDAHO, COMMONWEALTH
TRUST COMPANY OF PITTSBURGH, Trustee,
and A. C. ROBINSON,

Defendants.

AMENDED BILL OF COMPLAINT.

*To the Honorable Frank S. Dietrich, Judge of the
District Court of the United States for the District
of Idaho, Southern Division:*

The complainants above named file this, their
Amended Bill of Complaint herein, and for their
cause of action respectfully show to your Honor:

I.

That the complainants A. E. Caldwell, W. F.

Mikesell, V. E. Morgan, J. E. Pohlman, W. C. Pond, James W. Beauchamp, Carl Washburn and Harold M. Sims, were at the time of the commencement of this action, and still are, residents and citizens of the State of Idaho.

II.

That the defendant Twin Falls Salmon River Land & Water Company, was at all the times in this complaint mentioned and still is a corporation organized and existing under and by virtue of the laws and statutes of the State of Delaware and a citizen of said State, and as such corporation engaged in the building, construction and maintenance of a certain irrigation system and the sale of water rights therein for the reclamation of lands in the County of Twin Falls, State of Idaho, including the lands of the complainants hereinafter described.

III.

That the defendant, Salmon River Canal Company, Limited, was at the time of the commencement of this action and still is a corporation organized and existing under and by virtue of the laws and statutes of the State of Idaho and is a citizen of said State and is the corporation designated and provided for in the contract between the State of Idaho and the defendant Twin Falls Salmon River Land & Water Company, and intended by such contract to operate the irrigation works to be constructed by the defendant, the Twin Falls Salmon River Land & Water Company.

IV.

That the defendants John M. Haines, W. L. Gifford, Grace Sheperd, Joseph H. Peterson and Fred L. Huston, are respectively the legally elected, qualified and acting Governor, Secretary of State, Superintendent of Public Instruction, Attorney General and Auditor of the State of Idaho, and they are and ever since on or about the first day of January, A. D. 1913, have been and do constitute the State Board of Land Commissioners of the State of Idaho, and each and every one of the defendants in this paragraph of the Bill of Complaint named were, at the time of the commencement of this action, and still are residents and citizens of the State of Idaho.

V.

That the defendant Commonwealth Trust Company of Pittsburgh, was at the time of the commencement of this action, and still is, a corporation organized and existing under the laws of the State of Pennsylvania, and a citizen of said State.

VI.

That the defendant A. C. Robinson, was at the time of the commencement of this action and still is a resident and citizen of the State of Pennsylvania.

VII.

That on or about the 30th day of April, A. D. 1908, the defendant Twin Falls Salmon River Land & Water Company, made and entered into a contract with the State of Idaho, the latter acting by and through the State Board of Land Commissioners of

said State, under and by virtue of the terms of an Act of Congress approved August 18th, 1894, "An Act making appropriation for sundry civil expenses for the year ending June 20th, 1895, and for other purposes," commonly known as the "Carey Act," and the Statutes and Laws of the State of Idaho accepting and giving force and effect thereto, under and by virtue of the terms and conditions of said contract, the said defendant Twin Falls Salmon River Land & Water Company agreed to construct a certain irrigation system in the State of Idaho, consisting of a large storage reservoir in Twin Falls County, in said State, conserving and storing the waters of Salmon River in said State; and for the purpose of diverting and applying said waters so stored and conserved to a beneficial use, the said defendant Twin Falls Salmon River Land & Water Company agreed to construct numerous canals, laterals, head gates, weirs, aqueducts and other irrigation appliances for the purpose of conveying and distributing the said water to and over a large tract of land of the public domain within Twin Falls County, Idaho, including the lands hereinafter described, all of which said lands were segregated and set apart by the State of Idaho under the provisions of the said Carey Act, and the said irrigation system was to be constructed for the purpose of making water available to irrigate, reclaim and cultivate the lands hereinabove referred to, and in consideration of the premises, it was agreed by the said contract above referred to that the defendant Twin Falls

Salmon River Land & Water Company, should have the exclusive sale of shares or water rights in said canal for said land, and the State of Idaho agreed not to permit any person to enter upon or become the owner of any such land unless he was the holder of one share or water right for every acre entered; and it was understood and agreed that after the completion of said irrigation works, the said defendant Twin Falls Salmon River Land & Water Company should convey said reservoir and canal system to a corporation to be organized under the laws of the State of Idaho to be known and called the "Salmon River Canal Company, Limited," but that all of the stock in said corporation was to be held, voted and controlled by the said defendant Twin Falls Salmon River Land & Water Company until the holder of a share or water right in said system should pay at least thirty-five per cent. of the purchase price of such share or water right; that a copy of the said contract so made and entered into between the State of Idaho and the said defendant Twin Falls Salmon River Land & Water Company, is hereto attached marked Exhibit "A" and made a part of this complaint, and shall hereinafter be referred to as the "State Contract."

VIII.

That it was understood and agreed by and between the defendant Twin Falls Salmon River Land & Water Company and the State of Idaho, acting through the State Board of Land Commissioners of said State, in and by the agreement and contract

commonly called herein the State Contract, that the Twin Falls Salmon River Land & Water Company in no case should have the right to sell water rights or shares in said irrigation system hereinbefore referred to or in the Salmon River Canal Company, Limited, a corporation, to be formed as provided for in said State Contract, in excess of the appropriation of water for the irrigation and reclamation under said Carey Act; that the said segregation is commonly known as the "Salmon River Segregation" and the plat of the land embraced in said segregation is hereto attached, marked Exhibit "B" and made a part of this complaint.

IX.

That on or about the 1st day of June, A. D. 1908, the complainants, A. E. Caldwell, by himself or his predecessor in interest, made entry with the said State Board of Land Commissioners for the following described tract of land situated and being in Twin Falls County, Idaho, to-wit: The South Half ($S\frac{1}{2}$) of the Southwest Quarter ($SW\frac{1}{4}$) of Section Three (3); Northeast Quarter ($NE\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$) of Section Three (3); Southeast Quarter ($SE\frac{1}{4}$) of the Southeast Quarter ($SE\frac{1}{4}$) of Section Four (4), all in Township Fourteen (14), South of Range Sixteen (16), E. B. M., and thereupon, and at said time, for a valuable consideration, purchased from the Twin Falls Salmon River Land & Water Company, one hundred and sixty (160) shares or water rights in said irrigation works, and to be represented by an equal number of

shares of stock in the defendant, Salmon River Canal Company, Limited, and then and there and at said time, entered into an agreement or agreements in writing with the defendant, the Twin Falls Salmon River Land & Water Company, for such purposes; that the said contract is herein referred to as the "Settlers Contract" and the copy of the same is annexed hereto, marked Exhibit "C" and made a part of this complaint.

X.

That the other complainants herein, and various other settlers upon said tract hereinbefore referred to, at various and divers times between on or about the 30th day of April, A. D. 1908, and on or about the 30th day of June, A. D. 1908, made entries either by themselves or their predecessors in interest similar to the entry made by the complainant A. E. Caldwell, for various tracts of land under said Salmon River Segregation, all lying in Twin Falls County, Idaho; such entries being fully described on complainants' Exhibit "B" herein, and the list of names of entrymen and their predecessors in interest and number of shares or water rights held by such entrymen attached to said Exhibit "B," to all of which reference is hereby made for the date of entry and description of the various tracts so entered and number of shares or water rights held by such entrymen, and that at said times above stated the complainants other than the complainant A. E. Caldwell, or their predecessors in interest and all of the settlers upon said tract, made and entered into contracts

similar to the one entered into by the complainant A. E. Caldwell, or his predecessor in interest, and similar in form and substance to the contract called Settlers Contract herein, marked complainants' Exhibit "C," and at said time and times purchased from the defendant Twin Falls Salmon River Land & Water Company, shares or water rights in said irrigation works and to be represented by an equal number of shares of the stock in the defendant Salmon River Canal Company, Limited, and for the number of such shares of each of said complainants other than the complainant A. E. Caldwell, and all settlers upon said tract, these complainants refer to their Exhibit "B" which fully sets out the number of shares or water rights so purchased by such complainants or predecessors in interest and the other settlers from the defendant Twin Falls Salmon River Land & Water Company under the terms and conditions hereinabove stated.

XI.

That on or about the first day of June, A. D. 1908, the defendant Twin Falls Salmon River Land & Water Company, sold to divers persons who at that time held entries of an equal number of acres of land of said Salmon River Segregation about Seventy-five Thousand (75,000) shares or water rights in the irrigation works hereinbefore referred to for the irrigation of about Seventy-five Thousand (75,000) acres of land on said segregation and issued to such persons contracts similar in form and in substance to the contract herein referred to as the Settlers

Contract, and attached hereto and marked Exhibit "C," and that practically all of such contracts are now outstanding and in full force and effect, and that the complainants herein and all settlers on said Salmon Tract whose names appear upon complainants' Exhibit "B" hereto attached, are now holders of such settlers contracts, either as original entrymen and contractors, or by direct or mesne conveyance, and each and all of these complainants and other settlers whose names appear upon complainants' Exhibit "B" hereto attached, hold rights in the said irrigation system hereinbefore referred to as provided for and contemplated by said contracts.

XII.

That it was understood and agreed and contemplated by the terms of said State Contract, hereinbefore referred to, that each share or water right sold by the defendant Twin Falls Salmon River Land & Water Company, should represent a carrying capacity in said canal sufficient to deliver water at the rate of one one-hundredth of one cubic foot of water per acre per second of time for each share or water right sold and should also represent a proportionate interest in said canal and irrigation works, together with all rights and franchises therein, based upon the number of shares finally sold in said canal, and that in no case should water rights or shares be dedicated to any lands in said segregation or sold beyond the carrying capacity of the canal, or in excess of the appropriation of water therefor, and under and by the terms and conditions of the Settlers

Contract herein described, the defendant Twin Falls Salmon River Land & Water Company covenanted and agreed that the owner of a share or water right in said irrigation system hereinbefore mentioned, shall be entitled to receive one one-hundredth of a cubic foot of water per acre per second of time for the lands described in said contract.

XIII.

That the appropriation provided for by said State Contract for the irrigation works and system hereinbefore referred to, consists of the normal flow of water of the Salmon River, together with the drainage thereof and none other; that the normal flow of water of said Salmon River during the irrigation season is very small and that said irrigation works is dependent entirely upon the amount of flood waters stored, saved and conserved by the said Salmon River dam; that the said dam loses a great deal of water by seepage and evaporation, the exact amount of such loss these complainants do not know, but that the amount of water so lost is and will continue to be very great; that a great deal of water is lost in transportation from the said dam to the various farm units, the exact amount of which these complainants do not know, but the same is and will continue to be very great; that the amount of the available supply of water for use on the several land entries hereinbefore referred to, after deducting the loss which does and will continue to occur on account of the matters aforesaid is inadequate to irrigate the acreage entered upon under water contracts sold

and will not exceed fifty thousand (50,000) acre feet, and these complainants allege that at no time can it be reasonably or safely determined that more than fifty thousand (50,000) acre feet will be available for the uses of water right holders in said irrigation works delivered at a distance of one-half mile from each quarter section of land under said segregation.

XIV.

That the land of the complainants herein and all of the settlers on said Salmon Tract and included within the said segregation, is dry and arid in character and requires the artificial use of water thereon before crops of any kind or character can be raised, and that in order for the settlers on said tract to comply with the provisions of the said Carey Act and to irrigate and reclaim said land or to raise ordinary agricultural crops thereon, at least one-half miner's inch per acre continuous flow throughout the entire irrigation season, or at least two and three-fourths acre feet of water per acre, if delivered by periods of rotation as the needs of crops demand, is, and will continue to be necessary; said amount of water to be delivered within one-half mile of the respective land entries herein, and that such amount of water above stated, is, and will continue to be necessary even though the most skillful, efficient and beneficial methods of use and conservation be used and any less amount will be wholly insufficient to raise ordinary agricultural crops, and will not enable the complainants and settlers upon said tract to comply with the said Carey Act regarding a permanent water supply

to reclaim said land, or to enable them to farm or cultivate their said land profitably, and that unless the complainants and all settlers upon said Salmon Tract are able to secure the said amount of water for their land a great deal of such land will remain idle and unproductive, and the owner and holders thereof will suffer great and irreparable injury and damage.

XV.

That it was provided for and contemplated by the said State Contract, and the said Settlers Contracts, that an ample supply of water was and would be provided and actually furnished through the said irrigation works, to be delivered one-half mile from each quarter section of land in said segregation and sufficient in amount, time and manner of delivery to irrigate each acre of land upon which entries were made, for which shares or water rights were purchased as aforesaid in the usual, customary and ordinary manner among irrigation farmers, and to enable the owners and holders of said land to raise the ordinary, usual and profitable crops thereon, and to reclaim, cultivate and irrigate the same, and sufficient in amount, time and manner of delivery to thoroughly and properly irrigate, reclaim and cultivate each acre of said land, so as to comply with the said Carey Act and the Desert Land Laws of the United States and the Laws of the State of Idaho, and it was also provided for and contemplated by the said State Contract and the Settlers Contracts, that the water right purchased by the complainants and

other settlers on said tract per share or acre, was, and would be a right to receive one one-hundredth of a cubic foot of water per acre per second of time, equal to one-half miner's inch, for each acre of land irrigated, by a continuous flow during the entire irrigation season from April 1st to November 1st of each year, or an equal and proportionate amount if delivered by rotation or by periods of time and in no case less than necessary to thoroughly irrigate and reclaim it as required by law and to enable the owner or holder of such land to raise ordinary and usual agricultural crops in the usual, ordinary and customary manner among farmers and irrigators, using good and reasonable husbandry; that one-half miner's inch per acre continuous flow is equal to about four and sixteen one-hundredths (4.16) acre feet per acre.

XVI.

That at and prior to the time of the making of the Settlers Contracts herein, it was represented to complainants and other purchasers of water rights or shares in said irrigation system by the defendant Twin Falls Salmon River Land & Water Company, that ample water was available to supply the rights of these complainants and all of the settlers on the said system, and that the complainants and a large number of settlers on said tract, relying upon such representations, made as aforesaid, and believing them to be true, cleared their lands or a large portion thereof, of sage and other brush, and have planted such land with grasses, trees and other crops, all of

which are now growing upon said land, and needing artificial use of water, and without which, such crops will be injured and destroyed; that the complainants herein and a large number of settlers upon said tract, actually reside upon their respective land entries with their families and have so resided thereon for a long period of time, and are engaged and have been engaged in the cultivation of their respective lands, and there is now under cultivation in said segregation approximately thirty thousand (30,000) acres of land, all of which will demand and require the use of water during each irrigation season.

XVII.

That the defendant Twin Falls Salmon River Land & Water Company, has failed, neglected and refused and still fails, neglects and refuses to comply with the terms and conditions of the State Contract herein set out, in that, it has failed, neglected and refused and still fails, neglects and refuses to so construct its irrigation system as to make water available, ample and sufficient in quantity to furnish these complainants and other settlers upon said tract with the amount of water contracted to be furnished, and the said defendant Twin Falls Salmon River Land & Water Company, in violation of its contract with the State of Idaho, herein referred to as the State Contract, sold large number of water contracts or shares in said irrigation system, by the terms of which it undertook to furnish to such water contract holders a great amount of water far in excess of the appropriation of water made by the defendant, or assigned

to it and especially referred to in the said State Contract, and these complainants allege and aver that the said Twin Falls Salmon River Land & Water Company has sold and delivered large amount of water from its reservoir system to persons and corporations other than actual settlers and contract holders upon said segregation, though having an insufficient supply, and the defendant Twin Falls Salmon River Land & Water Company has sold, and delivered and still sells and delivers from the irrigation system and reservoir herein referred to, large amount of water to persons and corporations other than settlers upon said Salmon Tract, all of which is contrary to the terms and conditions, and expressly in violation of said contract.

XVIII.

That the said defendant Twin Falls Salmon River Land & Water Company has failed, neglected and refused to comply with the terms and conditions of the said State Contract and the Settlers Contract herein referred to, in that it has failed, neglected and refused to supply ample and sufficient supply of water to these complainants and other settlers upon said tract, and has failed, neglected and refused to supply any amount of water in excess of about three-fourths acre feet per acre, and complainants aver that approximately three-fourths acre feet of water per acre is the only amount now available for the use of all land in said segregation, and that the defendant Twin Falls Salmon River Land & Water Company, represents and alleges that no other or

further supply of water can be obtained from any source.

XIX.

That heretofore, and before the commencement of this action, these complainants and various other settlers upon said tract have made repeated demands upon the defendants John M. Haines, W. L. Gifford, Grace Sheperd, Joseph H. Peterson and Fred L. Huston, composing the State Board of Land Commissioners of the State of Idaho, to take such steps as necessary to compel the defendant Twin Falls Salmon River Land & Water Company, to comply with the terms and conditions of the said State Contract and to secure additional supply of water for said irrigation works, if possible, and if not possible, to reduce the acreage and contracts so that the total number of acres of land in said segregation should not exceed the amount of water available from said irrigation works; such water to be furnished and delivered under the terms of said State Contract and Settlers Contracts as aforesaid, but that the said State Board of Land Commissioners have failed and refused to take any steps or institute any action to bring about the results above stated, and the complainants and other settlers upon said tract have, prior to the commencement of this action, demanded that the said State Board of Land Commissioners take such action as is necessary under the laws of the State of Idaho to have the State Contract herein referred to forfeited as provided by law, or that steps be taken in court to protect the interests of the complainants and

other settlers upon said tract, but that such State Board of Land Commissioners have failed and refused and still fail and refuse to comply with such terms, or to take any steps whatever.

XX.

That patent for the land in said segregation has not issued from said United States to the State of Idaho, or to the settlers upon said tract, and the Department of the Interior is now withholding its decision for the issuance of such patents pending proof that the said land has been reclaimed within the contemplation of the provisions of the Carey Act, and has heretofore notified the State Land Board of the State of Idaho that the acreage in said segregation must be reduced because of insufficiency of water.

XXI.

That unless there is additional water made available and supplied to the land in said segregation, so as to furnish each acre with the amount of water hereinbefore specified and necessary, or, if such amount of water can not be made available, there be canceled enough water contracts to reduce the acreage having appurtenant water rights to a point equal to the water supply, all of the complainants and other contract holders will suffer great and irreparable injury; that if each contract holder entitled to receive water is furnished only the proportionate amount of water now available, the entire segregation will be spotted with uncultivated areas or areas not properly cultivated because of insufficient water supply.

XXII.

That under and by virtue of the terms and conditions of the State Contract and the Settlers Contracts, and because of the failure on the part of the defendant, Twin Falls Salmon River Land & Water Company, to comply with the terms and conditions of said State Contract and the said Settlers Contracts, the balance due from these complainants and all settlers on said tract and all water contract holders was intended to be and does constitute a trust fund for the purpose of carrying out the terms and conditions of the said State Contract and the said Settlers Contracts and the purposes of the said Carey Act, and particularly to supply entrymen and contract holders with an ample and sufficient supply of water in a substantial ditch as hereinbefore mentioned; that there is now due from these complainants and other contract holders under said project, as it now exists, a sum equal to about Thirty-seven (\$37.00) Dollars per acre, or a total of about Two Million Seven Hundred and Seventy-five Thousand (\$2,775,000.00) Dollars; that if said tract be cut down to Thirty Thousand (30,000) acres there is and would be due about One Million One Hundred and Ten Thousand (\$1,110,000.00) Dollars.

XXIII.

That during all the times since the incorporation of the defendant Salmon River Canal Company, Limited, and since the defendant Twin Falls Salmon River Land & Water Company, has notified settlers under its system that water was available for deliv-

ery, the said defendant Twin Falls Salmon River Land & Water Company through the defendant Salmon River Canal Company, Limited, has collected large sums of money from water contract holders under said system, including these complainants, ostensibly for the purpose of applying the same on account of and for maintenance charges, but in reality such sums and a great portion thereof were used in payment of excessive and illegal salaries and expenses of the officers, employees and attorneys of the defendant Twin Falls Salmon River Land & Water Company and the said defendant Twin Falls Salmon River Land & Water Company through said Salmon River Canal Company, Limited, at all times hereinabove stated, collected such alleged maintenance charges from all water contract holders upon said Salmon Tract although only a portion of the water contracted to be delivered was in fact delivered; that said defendant Twin Falls Salmon River Land & Water Company, fraudulently applied such maintenance charges so collected as aforesaid, in paying excessive and illegal salaries of employees and attorneys and in paying exorbitant rent for buildings and in purchase of equipments for its own use and benefit, and for the use and benefit of its kindred projects and not for the use and benefit of the said Salmon River Canal Company, Limited.

XXIV.

That the defendant, the Twin Falls Salmon River Land & Water Company, is wholly insolvent and unable to respond in damages to these complainants and

other holders of contracts on said tract, and unless the several and total amounts due from complainants and other contract holders be treated as a trust fund to carry out the terms and conditions of said State Contract and the said Settlers Contracts, these complainants and all contract holders under said segregation will be without adequate remedy and will suffer great and irreparable loss and injury, and the said irrigation system will be a total failure and the said segregation and no part thereof will be entitled to patent from the United States.

XXV.

Complainants further allege and aver that they do not know positively whether or not it is practicable or feasible to secure an additional supply of water for the said segregation, but these complainants have been informed and believe, and therefore allege the fact to be, that by the expenditure of a great deal less than the amount now due from the complainants and all contract holders on said tract, a sufficient supply of water can be secured to irrigate and reclaim the tract, but if sufficient supply of water can not be secured, the said irrigation project can not be made a success unless a tract of land not to exceed Thirty Thousand (30,000) acres in extent be set apart as land subject to water rights and all other lands on the said segregations be released and declared without a water right therein.

XXVI.

That the defendants Twin Falls Salmon River Land & Water Company and Salmon River Canal

Company, Limited, are in the actual control and operation of said system of irrigation works, and have refused and still refuse to recognize any rights of priority to the available water in said irrigation works based upon actual settlement or improvement or otherwise, and threaten to deliver water to all contract holders regardless of available supply; that unless the relative rights of all entrymen are fixed by a proper order of decree of this Court, the amount of acreage under cultivation will be so great that water will not be sufficient to irrigate the same, but only a small portion thereof, and great confusion, trouble and injury will result to all persons holding water rights in said system, as well as a multiplicity of suits prosecuted by such persons so interested to secure or protect their rights therein.

XXVII.

That the defendant, Salmon River Canal Company, Limited, is in only nominal control of said system; but that the same is under the dominion of the defendant Twin Falls Salmon River Land & Water Company, and will continue to be under the control and dominion of said Twin Falls Salmon River Land & Water Company, for a number of years to come; that the defendant Twin Falls Salmon River Land & Water Company does, and will control for a number of years to come and vote nearly all of the outstanding stock of said Salmon River Canal Company, Limited, under the power contained in the State Contract hereinbefore referred to; that the said Twin Falls Salmon River Land & Water Company elected and

selected the present Board of Directors of said Salmon River Canal Company, Limited, and all the officers thereof, and the officers of said Salmon River Canal Company, Limited, are the agents of the defendant Twin Falls Salmon River Land & Water Company; that the interests of these complainants and all settlers on said Salmon Tract and owners and holders of said contracts in said irrigation works are adverse to the interests of the Twin Falls Salmon River Land & Water Company, and that the said last named company has refused and still refuses to take any steps to protect the interests of the Salmon River Canal Company, Limited, in the matters herein set out, and these complainants are compelled to institute this action, not only in their own behalf and for their own benefit, but in behalf of and for the benefit of all settlers and water contract holders upon said tract and for the benefit of said defendant Salmon River Canal Company, Limited; that by reason of the premises, it would be useless to demand and ask the defendant Salmon River Canal Company, Limited, to institute and prosecute this action.

XXVIII.

That the defendant Twin Falls Salmon River Land & Water Company, through the defendant Salmon River Canal Company, Limited, controls the distribution of water in the irrigation works herein referred to to consumers; that the said Twin Falls Salmon River Land & Water Company and the said Salmon River Canal Company, Limited, have refused and still refuses to supply complainants and other

contract holders upon said contract the water as contemplated by said State Contract and Settlers Contracts, fraudulently pretending that the water as heretofore supplied is ample for the acreage entered, and the said defendants Twin Falls Salmon River Land & Water Company and Salmon River Canal Company, Limited, have refused to deliver water in the quantities contemplated by said contracts and as required, but in fact delivered water to such settlers, including these complainants, in a very much less amount; that unless this Court, during the pendency of this action appoint a receiver or receivers, and takes possession of said irrigation works and operate the same for the benefit of those entitled to water therefrom, the said defendant Twin Falls Salmon River Land & Water Company will continue to oppress these complainants and the other settlers upon said tract, and such conduct can only result in a multiplicity of suits; that the said defendant Twin Falls Salmon River Land & Water Company, and the defendant Salmon River Canal Company, Limited, because it is under the control and dominion of the said defendant Twin Falls Salmon River Land & Water Company, have refused and still refuses to adopt a reasonable or proper system of delivery, or one required by the condition of the crops, and have refused and still refuses and will continue to refuse to recognize the rights of the complainants and other settlers upon said tract, or permit such water contract holders to have a voice in determining when water should be delivered, or to receive the amount of water con-

tracted to be delivered; that the said defendants Twin Falls Salmon River Land & Water Company and said Salmon River Canal Company, Limited, have adopted and do adopt a system of delivery by periods, but have not delivered and will not deliver an ample supply of water during such period, or on demand, or as the needs of the crops require; that the result of such methods and system of delivery as aforesaid, has been to cause hardship, annoyance and loss of crops; that to continue the same will produce great loss and damage and numerous claims for set-offs and reimbursements from the several amounts due from settlers to said trust fund and greatly affect the said trust fund and the collection thereof; that unless the said settlers upon said tract can receive water as agreed in their contracts, and as provided for in said State Contract, they, and each of them will refuse to pay towards said trust fund the amount due from them under and by virtue of the terms of their respective contracts; that the collection of said trust fund by a Receiver or Receivers can not be effectually accomplished unless all matters connected with said contracts, including the operation of said irrigation works, is taken under the control of this court through its Receiver.

XXIX.

That heretofore, and before the commencement of this action, and on or about the first day of June, A. D. 1908, and long time prior to the construction and completion of the irrigation works hereinbefore referred to, and prior to the time that any water was

made available to contract holders upon said Salmon Tract, the defendant Twin Falls Salmon River Land & Water Company, made, executed and delivered a pretended deed of trust to the defendant American Trust & Savings Bank, Trustees, by the terms of which said deed of trust, the said defendant Twin Falls Salmon River Land & Water Company pretended and attempted to create a lien upon all dams, reservoirs, canals, ditches, laterals, head gates, flumes and the entire irrigation system of the said Twin Falls Salmon River Land & Water Company, together with all lands, rights of way, easements, privileges and franchises for same, and all appliances and power connected therewith, then owned or thereafter acquired, and also all notes, contracts and mortgages then owned or which may thereafter be acquired by said Twin Falls Salmon River Land & Water Company in consideration of sale of water rights, and covenanted and agreed under and by virtue of the terms and conditions of said deed of trust to assign in writing all contracts for water rights in said irrigation system, and complainants aver that the said Twin Falls Salmon River Land & Water Company, did, prior to the commencement of this action, assign practically each and all water contracts it made with settlers to said American Trust & Savings Bank; that the said deed of trust attempted to create a lien for the sum of Four Million (\$4,000,000.00) Dollars to secure bonds issued or to be issued by the defendant Twin Falls Salmon River Land & Water Company, and the said defendant the

American Trust & Savings Bank, thereupon, and on or about said time, accepted said trust for the uses and purposes therein set out; that the said Deed of Trust was filed for record on August 22nd, A. D. 1908, in the office of the County Recorder of Twin Falls County, Idaho, and recorded in Book 5 of Mortgages at pages 302 to 325 inclusive, and the same is now of record in the office of said County Recorder and purports to be a lien on said irrigation system of the defendant Twin Falls Salmon River Land & Water Company and upon all of the contracts of these complainants and all other settlers and contract holders upon said tract with the Twin Falls Salmon River Land & Water Company; that complainants refer to Book 5 of Mortgages of Twin Falls County, Idaho, pages 302 to 325 inclusive, for a copy of said Deed of Trust, and by such reference make said record and copy of said Deed of Trust a part of this Bill as Exhibit "D," with the same force and effect as if the same were here in full set out and attached hereto.

XXX.

That thereafter and on or about the 8th day of October, A. D. 1914, the said American Trust & Savings Bank, Trustee, duly tendered its resignation as such Trustee, and thereupon, and at said time, delivered and conveyed to the defendant, Commonwealth Trust Company of Pittsburgh, all the rights, liens and property it held under and by virtue of the Trust Deed referred to in paragraph XXIX of this Amended Bill, and on or about the 9th day of October, A. D.

1914, the defendant Twin Falls Salmon River Land & Water Company, appointed the said Commonwealth Trust Company of Pittsburgh as Trustee under said trust deed to act in place and stead of the said American Trust & Savings Bank, and the said Commonwealth Trust Company of Pittsburgh duly accepted such trusteeship on the 9th day of October, A. D. 1914; that the resignation of said American Trust & Savings Bank, the original trustee under the trust deed herein referred to, was duly filed for record in the office of the County Recorder of Twin Falls County, Idaho, on the 19th day of October, A. D. 1914, and recorded in Book 2 of Miscellaneous Records at page 367, and these complainants refer to said record, and by such reference make the same a part of this Bill with the same force and effect as if the same were here fully set out; that the appointment of the defendant Commonwealth Trust Company of Pittsburgh as Trustee in place and stead of said American Trust & Savings Bank, the original Trustee mentioned in said trust deed, was duly filed for record and recorded in the office of the Recorder of Twin Falls County, Idaho, on the 19th day of October, A. D. 1914, in Book 2 of Miscellaneous Records at page 369, and these complainants refer to said record, and by such reference make the same a part of this Bill with the same force and effect as if it were here fully set out; that the acceptance of the trusteeship under said Trust Deed by the said Commonwealth Trust Company of Pittsburgh was duly filed for record and recorded in the office of the Re-

corder of Twin Falls County, Idaho, on the 19th day of October, A. D. 1914, in Book 2 of Miscellaneous Records at pages 371 and 372, and these complainants refer to such records, and by such reference make the same a part of this Bill with the same force and effect as if the same were here fully and at length set out.

XXXI.

That by reason of the matters and things set out in this Bill of Complaint and by reason of the fact that the defendant Twin Falls Salmon River Land & Water Company, has failed, neglected and refused to comply with the terms and conditions of the said State Contract hereinbefore referred to and the said Settlers Contracts and by reason of the fact that the Twin Falls Salmon River Land & Water Company has failed, neglected and refused, and still fails, neglects and refuses to so complete its said irrigation system as to comply with the terms and conditions of the State Contract and Settlers Contracts, and to furnish and make available the water required by it to be furnished to the contract holders with it in accordance with the terms and conditions of said State Contract and said Settlers Contracts, the pretended lien of said deed of trust, if any, is subject and subordinate to the rights of the purchasers of shares or water rights in said irrigation system, and the grantee in said deed of trust took said deed of trust, subject to the conditions herein set out, and by reason of the premises, the pretended lien of said deed of trust is null, void and of no effect as against these

complainants and other water contract holders in said irrigation system.

XXXII.

That thereafter, and on or about the 14th day of October, A. D. 1914, the defendant, Twin Falls Salmon River Land & Water Company, made a pretended assignment to the defendant A. C. Robinson by the terms of which it sought to sell, transfer, assign and set over unto the defendant A. C. Robinson, contracts for the supply of water by the Twin Falls Salmon River Land & Water Company made with various persons; that such pretended assignment set forth the names of the persons with whom such contract was made, the face value of the amount due under such contracts, the number of such contracts and the number or letter of the public records of Twin Falls County wherein the said contracts were recorded; that the total amount of the unpaid balance upon such water contracts assigned as aforesaid were set out in said assignment at One Hundred Ninety-four Thousand Three Hundred Ninety-seven and 48-100 (\$194,397.48) Dollars; that the said pretended assignment above referred to was filed for record and recorded in the office of the County Recorder of Twin Falls County, Idaho, on the 19th day of October, A. D. 1914, in Book 3 of Assignment of Water Contracts at page 1, and these complainants refer to said records above mentioned and by such reference make the same a part of this Bill with the same force and effect as if the same were here fully and at length set out.

XXXIII.

That the pretended assignments referred to in the preceding paragraph of this Bill were made wholly without any valuable consideration, and these complainants are informed and believe and allege the fact to be that the defendant A. C. Robinson threatens to collect the amounts due from the water contract holders described in said assignment, and the said A. C. Robinson will collect said amounts or the greater part thereof unless restrained from doing so by an order or decree of this Court.

XXXIV.

That the questions sought to be determined in this action are of common and general interest to all settlers upon said Salmon Tract and all water contract holders similarly situated with the complainants herein, and they constitute a class so numerous as to make it impracticable to bring them all before this court, and by reason thereof, these complainants bring this action in their own behalf and on behalf of all other settlers and water contract holders upon said tract similarly situated with them.

XXXV.

That by reason of the premises and the matters and things set out in this bill of complaint, these complainants and all other settlers upon said Salmon Tract have not a plain, speedy or adequate remedy at law, and unless this Court grant them the relief herein sought, they and each of them will suffer great and irreparable wrong and injury and will be wholly remediless.

Wherefore, complainants pray the judgment of this Honorable Court:

a. That it be adjudged and decreed that the amount due from each and every complainant and from each and every settler and contract holder of water rights in said irrigation system herein referred to entitled to receive water under the order of this Court, constitute a trust fund for the purpose of carrying out the objects and purposes of the said State Contract and the Settlers Contracts set out in this complaint, and particularly to furnish each and every acre of land having water rights appurtenant to it from said irrigation works with an ample and sufficient supply of water as contemplated by said State Contract and said Settlers Contracts and not less than one-half miner's inch per acre continuous flow or two and three-fourths acre feet per acre if delivered by periods upon demand of the several owners thereof, measured and delivered not more than one-half mile from each quarter section of land on the said irrigation system, and that the trust so declared and created be prior and superior to the rights or claims of any and all persons whatsoever; that the pretended lien created or attempted to be created by the defendant Twin Falls Salmon River Land & Water Company under and by virtue of the deed of trust made by it to the American Trust & Savings Bank, Trustee, and now claimed by the substituted Trustee, the defendant Commonwealth Trust Company of Pittsburgh, and described herein as complainants' Exhibit "D" be canceled and declared to be void and of no effect and held for naught

and declared to be subject and subordinate to the rights of the complainants and other water contract holders in said irrigation system as in this complaint set out, and the said defendant Commonwealth Trust Company of Pittsburgh, Trustee, or any holder of bonds issued by the defendant Twin Falls Salmon River Land & Water Company, be restrained and enjoined from collecting any sum or sums of money due from contract holders on the said irrigation system upon such contracts either as principal or interest, and that the defendant A. C. Robinson be restrained and enjoined from collecting any monies upon the water contracts assigned to him by the defendant Twin Falls Salmon River Land & Water Company as hereinbefore set out, and that such pretended assignment of such water contracts be declared to be void and of no effect and set aside.

b. That a Receiver be appointed according to the law and the usage of this Court, and that such Receiver be authorized, directed and empowered to take immediate possession of the irrigation system in this complaint referred to and to receive and collect all sums due from all water contract holders in said irrigation system entitled to receive water therefrom under the order of this court, including interest, and to hold, use and dispose of the same as directed by this Court for the purposes in this complaint set out, and that each and all of the complainants and all water contract holders in said irrigation system who are to receive water therefrom under the order of this Court be authorized and directed to pay any and all sums due on said contracts to said Receiver, and

that the said defendant Twin Falls Salmon River Land & Water Company and the defendant Salmon River Canal Company, Limited, and each of them, and their and each of their agents, officers, attorneys, servants, employees and assigns, be restrained and enjoined from collecting or attempting to collect any such sums of money so due from any settlers or water contract holders in said irrigation system, or their assigns.

c. That the said Receiver be empowered and directed to secure additional supply of water for such segregation, if the same be found feasible; or, in lieu thereof, this Court direct the manner and method of reducing the said segregation to a point within the water supply, so that the land remaining shall have appurtenant thereto an ample supply of water and not less than the amount claimed by these complainants as stated in this complaint, and that the water rights and water contracts for all land beyond and outside of said area so established as aforesaid, be annulled, canceled and held for naught, and the defendant Salmon River Canal Company, Limited, be authorized and directed to cancel the corporate stock therefor, and be restrained and enjoined from recognizing such land as entitled to water, or from delivering or furnishing water to or for said lands.

d. That it be adjudged, decreed and determined that in the event such segregation be reduced as aforesaid, the owner or holder of the land and appurtenant water right, be entitled to receive from the said trust fund under the direction of this Court, any

and all sums of money paid on account of the purchase of said water right, with legal interest thereon, together with all other legal damage to be determined by this Court, resulting to such owner or holder by reason of the cancellation of his said water right.

e. That this Court decree, determine and fix all priorities existing, if any, by reason of settlement and improvement, and that pending a final determination of this action, the defendants Salmon River Canal Company, Limited, and Twin Falls Salmon River Land & Water Company, be enjoined and restrained from delivering or furnishing any water to any land not actually in cultivation at the time of the filing of this complaint.

f. That the said Receiver be authorized and directed to take immediate possession and control of said irrigation system described in this complaint and to deliver and furnish water as covenanted to be furnished on the terms and conditions of the Settlers Contract and State Contract herein to the lands entitled thereto, and that the said Receiver take possession of all monies due or collected for maintenance for the year 1914, and for the subsequent years if the Receiver be in charge of said irrigation system, or until further order of this Court, and use and expend the same in the operation and repair of said irrigation system, and that the defendant Twin Falls Salmon River Land & Water Company and the defendant Salmon River Canal Company, Limited, their servants, agents, officers and employees be directed to turn over the money col-

lected by them, if any, for maintenance charges during the year 1914 to said Receiver.

g. That the said Receiver be authorized and directed to maintain the expenses incurred by these complainants in this action, and to pay the costs, attorneys' fees, witness fees and other proper items of expense as may be directed by this Court.

h. That the said Receiver be authorized and directed to issue Receiver's certificates from time to time as may be ordered by this Court for the purpose of said Receivership.

i. That the defendant Twin Falls Salmon River Land & Water Company be compelled to account to this Court for any and all sums converted and used by it from the maintenance charges collected by the defendant Salmon River Canal Company, Limited, and misappropriated by said Twin Falls Salmon River Land & Water Company as in this Bill set out.

j. That these complainants and all water contract holders in said irrigation system hereinbefore described, have such other or further relief in the premises as may be just and equitable, together with the costs and disbursements of this action.

Answer under oath waived.

C. O. LONGLEY,
W. E. GOLDEN,

Solicitors for Complainants,
Residing in Twin Falls, Idaho.

Duly verified. Endorsed: Filed Nov. 9th, 1914.
A. L. Richardson, Clerk. By E. B. Yarrington,
Deputy.

PLAINTIFF'S EXHIBIT "A."

FILED WITH AMENDED COMPLAINT.

(Title of Court and Cause.)

AGREEMENT BETWEEN THE STATE OF IDAHO AND TWIN FALLS SALMON RIVER LAND AND WATER COMPANY.

This Agreement, Made and entered into in duplicate this 30th day of April, 1908, by and between the State of Idaho, the party of the first part, through the *State Board of Land Commissioners* of said State, said Board consisting of Frank R. Gooding, Governor, Robert Landson, Secretary of State, John J. Guheen, Attorney General, and S. Belle Chamberlain, Superintendent of Public Instruction of said State, and the *Twin Falls Salmon River Land and Water Company*, a corporation organized and existing under the laws of the State of Delaware and duly authorized to do business in the State of Idaho (having complied with the laws thereof relative to foreign corporations), the party of the second part, *Witnesseth*; That

Whereas, the party of the second part has succeeded to all the rights of C. B. Hurtt, George F. Sprague, I. B. Perrine and H. L. Hollister for the irrigation of lands in Twin Falls County, State of Idaho, which rights are evidenced by the Proposal and Request heretofore made by them on the 12th day of August, 1907, which Proposal and Request were approved by the State Board of Land Commissioners of the State of Idaho on the 12th day of August, 1907, and

Whereas, all of the property rights and franchises of the said C. B. Hurtt, George F. Sprague, I. B. Perrine and H. L. Hollister acquired under and by virtue of the said accepted proposal and request have by the consent of the State Board of Land Commissioners been duly transferred to the party of the second part herein.

It is Mutually Agreed and Covenanted as follows:

Purpose of the Contract.

1. That for and in consideration of the covenants of the said party of the first part herein contained, the party of the second part agrees to construct and build those certain irrigation works mentioned and described in the aforesaid Proposal and Request dated on the 12th day of August, 1907, and hereinafter more particularly described and to sell shares or water rights in said canal and irrigation system from time to time as hereinafter provided to the person or persons filing upon the lands hereinafter described and also to the owners of other lands not described herein but which are susceptible of irrigation from this canal system or from any extension or enlargement thereof; said shares or water rights to be sold on the terms hereinafter provided and also to transfer the ownership, management and control of said canal system to the purchasers of shares or water rights as hereinafter provided.

GENERAL SPECIFICATIONS FOR CONSTRUCTION.

Reservoir.

II. The reservoir is to be formed by a masonry dam two hundred and ten feet in height, five hundred and fifty feet long on top, founded upon a solid rock foundation and extending from wall to wall of the lava Canyon on Salmon River in Section 18, Township 14 South of Range 15 East, Boise Meridian, in Twin Falls County, State of Idaho.

The reservoir formed by the dam will have a surface area of over three thousand acres, an available capacity of 180,000 acre feet and will extend southward from the dam a distance of approximately twelve miles.

Dam.

The dam will be constructed of rock solidly imbedded in concrete. Its top width to be fifteen feet, its bottom width (210 feet below the crest) will be one hundred and nineteen feet; it will be built upon an arch of two hundred and twenty-five feet radius and with a height and length as above specified.

Tunnels.

The water will be diverted from the reservoir through a tunnel ten feet by ten feet in Section equipped with suitable metal gates in concrete settings.

The first tunnel will be approximately 2500 feet long followed by an open cut approximately 800 feet long which cut will be followed by a second tunnel

of the same length and cross section as the first. The tunnels are to be concrete lined where necessary and to be built upon a grade of one in one thousand.

Canal.

Beyond the end of the second tunnel described above the water shall be conveyed in open channels to the land to be reclaimed, using in part artificial channels and in part natural channels of suitable section grade and character of material. Both natural and artificial channels shall have a capacity of one-hundredth of one second feet of water for each acre of land served by them.

The main canal above the first point of distribution shall have a capacity of one thousand second feet, which is likewise the capacity of the tunnel section.

The grades and cross sections of the canal may vary to suit the local conditions and natural channels or coulees shall be utilized when suitable.

In earth sections, the main canal shall have a bottom width of thirty-two feet, a water depth of eight feet, the sides shall have slopes of three to one and the grade of the canal shall be one in five thousand.

Outlets from the main canal shall be built of concrete or other equally durable material with gates of wood or steel.

The canal system is to be surveyed and laterals are to be hereafter located, all entries of land being made subject to such location.

Changes in these plans and specifications may be

made by second party with the consent of the State Engineer and the State Board of Land Commissioners.

Detailed plans will be hereafter filed with the State Engineer and with the State Land Board and when so approved, shall become final.

Right of Way.

III. The said party of the first part grants to the said party of the second part a right of way across all lands belonging to the State of Idaho or that may be ceded to the State by virtue of the Act of Congress commonly known as the Carey Act or by any other laws (and particularly the lands hereinafter described), for the construction and operation of said canals, reservoirs and distributing system therefrom and for the necessary waste ditches which right of way shall be equal to the actual width of the canal, lateral or waste ditch, at its base from toe to toe of the embankment together with a strip of land along one side of such canal, lateral or waste ditch adjacent thereto not to exceed fifty feet in width along the main canal, thirty (30) feet in width along the laterals branching from said main canal and a proper width along the smaller laterals and waste ditches; said right of way to be located and designated by the Chief Engineer of the party of the second part and approved by the State Engineer and in all cases to be sufficient for ingress and egress along said canal, lateral or waste ditch in proportion as the necessity therefor exists and all water users on lands irrigated from said canal or laterals shall have

such right of way as may be necessary from second party's canal or laterals to their own land in order to construct and maintain the necessary service ditches for their own use and such right of way across said land as may be necessary for waste ditches.

No more laterals, service or waste ditches shall be constructed across any premises than are necessary in the opinion of the Chief Engineer of the Company and the State Engineer. The laterals, service and waste ditches shall be constructed under the direction of the Chief Engineer of the Company and subject to the approval of the State Engineer. In case any land owner is dissatisfied with the location of any service ditch across his premises, he shall have the right to appeal to the State Engineer whose decision shall be final.

Detailed maps showing the location of canal, laterals, reservoir and waste ditches shall be filed with the Board and with the State Engineer, but such filing need not be made prior to the lands being thrown open for settlement. No compensation shall be paid to land owners for the right of way herein provided for.

Appropriation of Water.

IV. The party of the second part is the owner of that certain water right evidenced by permit No. 2659 for 1500 cubic feet per second of the waters of Salmon River in Twin Falls County, State of Idaho, issued by the State Engineer of the State of Idaho, to be used for the irrigation of the lands described

in Exhibit "A" herewith, together with other lands susceptible of irrigation from said system, which water right is hereby dedicated for use upon said lands and it is agreed and understood that the dam hereinbefore mentioned shall be constructed so as to provide a reservoir for the impounding of 180,000 acre feet of water, which amount, in addition to the normal flow of the said stream during the irrigation period, has been determined to be sufficient to furnish two and three-fourths acre feet of water per acre for each acre of land to be irrigated.

And the second party promises and agrees to build and construct the canal and lateral system of sufficient capacity to deliver water to the users thereof at the rate of one-hundredth of a second foot per acre for each acre of land to be irrigated.

Entry of Lands.

V. Upon the execution of this contract and when the actual construction of said canal shall have been inaugurated the said party of the first part will, after notice given in conformity with law, throw open the hereinafter described lands or a specified portion thereof for settlement under such regulations as to the manner of said opening as shall be prescribed by the State Board of Land Commissioners.

Application for Lands.

VI. The said party of the first part through its State Board of Land Commissioners agrees that it will not approve any application for or filing on the lands hereinafter described until the person or per-

sons so applying shall furnish to the said Board a true copy of the contract entered into with the party of the second part for the purchase of sufficient shares of water rights in said irrigation works for the irrigation of said lands; said shares or water rights to be evidenced by the stock of the Salmon River Canal Company, Limited, as hereinafter provided and the said second party stipulates and agrees that to the extent of the capacity of the irrigation works and to the extent of the water rights to which it is entitled as rapidly as the lands are open for entry and settlement, it will sell or contract to sell water rights or shares for land to be filed upon the qualified entrymen or purchasers without preference or partiality other than that based upon priority of application, it being understood, however, that priority of application or priority of entry or settlement shall not give any priority of right to the use of water flowing through the canal against subsequent purchasers but shall entitle the purchaser to a proportionate interest only therein, the water rights having been taken for the benefit of the entire tract of land to be irrigated from the system. The priority of application upon the opening days shall be determined by a system to be devised under the direction of the State Board of Land Commissioners.

Sale of Land by the State.

VII. That the said party of the first part, acting through its State Board of Land Commissioners, agrees to sell the lands herein described to such persons as are or may be by law entitled to file upon

the same for the sum of Fifty cents (\$.50) per acre, half of which sum shall be paid at the time of application for the entry of such lands made to said Board and the remaining one-half at the time of the making of final proof thereon.

Price of Water Rights.

VIII. Said party of the second part further agrees and undertakes that it will sell or cause to be sold to the person or persons filing upon any of the lands herein described or to the owners of any other lands not described herein but which are or may be susceptible of irrigation from its canal system by good and sufficient contract of sale with right of possession and enjoyment by the purchaser pending its fulfillment a water right or share in said canal for each and every acre filed upon or purchased from the State or acquired from the United States. Each of said shares or water rights shall represent a carrying capacity in said canal sufficient to deliver water at the rate of one-hundredth (1-100) of one (1) cubic foot of water per acre per second of time and each share or water right sold or contracted to be sold as herein provided shall also represent a proportionate interest in said canal and irrigation works together with all rights and franchises therein based upon the number of shares finally sold in said canal; said irrigation system, however, is to be built in accordance with the plans heretofore filed with the Board, which system, according to said plans, has been determined by the State Engineer to have the carrying capacity hereinbefore mentioned. Such water rights or shares

shall be sold to the person or persons aforesaid for the lands hereinafter described or for lands which are susceptible of irrigation from said system as follows:

To the person or persons filing upon any of said lands at a price not exceeding Forty Dollars (\$40) per share to be paid for as follows:

One-fifth (1-5) in cash at the time of sale and the remainder in five equal annual installments bearing interest at the rate of six per cent. (6%) per annum payable annually. To the person or persons purchasing any portion of sections No. 16 or 36, which are susceptible of irrigation and reclamation from this canal at a price not to exceed Thirty Dollars (\$30) per share provided said water rights are purchased within one year after the purchase of the lands from the State and not exceeding Forty Dollars (\$40) per share at any time thereafter; said payments upon said State lands to be made one-seventh (1-7) at the time of purchase and the remainder in six (6) equal annual installments with interest thereon at the rate of six per cent. (6%) per annum payable annually. In case the purchaser or entryman on desert lands, homestead lands or any lands other than those segregated under the Carey Act declines to purchase water rights within one year after the Carey Act lands are thrown open for settlement, the sum of two dollars and forty cents (\$2.40) may be added to the price of water rights for each year's delay or fraction thereof. No charge shall be made for water rights for lands taken by the right of way for any

railroad filing its plat with the State Board of Land Commissioners prior to June 1, 1908, and all entries of land shall be made subject to such right of way.

This agreement shall not be construed to prevent the sale of shares or water rights on terms more favorable than those herein provided or to prevent the payment of installments on the purchase price in advance of maturity of the same at the option of the purchaser but in no case shall water rights or shares be dedicated to any lands before mentioned or sold beyond the carrying capacity of the canal or in excess of the appropriation of water therefor.

Transfer of Possession and Management of Canal.

IX. It being necessary to provide a convenient method of transferring the ownership and control of said canal from the said party of the second part herein to the purchasers of water rights in said canal and for determining their rights among themselves and between said purchasers and the party of the second part herein; for the purpose of operating and maintaining said canal during the period of construction and afterwards for the purpose of levying and collecting toll charges and assessments for the carrying on and maintenance of said canal and the operation and management thereof, it is hereby provided that as soon as said lands are ordered thrown open for settlement a corporation to be known as the Salmon River Canal Company, Limited, shall be formed at the expense of the party of the second part, the articles of incorporation of said Company to be in substantially the form which is filed here-

with and made a part hereof; that the authorized capital stock of said corporation shall be one hundred and fifty thousand shares (150,000) which amount is intended to represent one share for each acre of land which may be hereafter irrigated from said canal. The entire authorized amount of the capital stock of said corporation shall be delivered to the party of the second part herein in consideration of the covenants and agreements herein contained in order to enable it to deliver to purchasers of water rights the shares of stock representing the same; said shares of stock, however, shall have no voting power and shall not have force and effect until they have been sold or contracted to be sold to the purchasers of land under this irrigation system. At the time of the purchase of any water right or as soon thereafter as convenient there shall be issued to the purchaser thereof one share of the capital stock of said corporation for each acre of land entered or filed upon; that the said party of the second part therein shall in case of said water rights or shares of stock are not fully paid for require the endorsement and delivery to it of said stock and shall at the same time require of said purchaser an agreement that until thirty-five per cent. of the purchase price of said stock has been paid, the said party of the second part therein shall vote said stock in such manner as it may deem proper at all meetings of the stockholders of said corporation and the said Salmon River Canal Company shall have the management, ownership and control, as above set out, of the said

canal system as fast as the same is completed and turned over by it for operation by the said party of the second part, as hereinafter provided. Whenever it is certified by the Chief Engineer of the Company and the State Engineer that certain portions of the said canal are completed for the purpose of operation, the same may, with the consent of the State Land Board be turned over to the Salmon River Canal Company, Limited, for operation. Such transfer and operation, however, shall not in any manner lessen the responsibility of the said second party with reference to the terms of the contract, nor shall such consent on the part of the State Land Board be construed as a final acceptance of such portion of such canal, it being always understood that the acceptance of such canal must be in its entirety and that the bond given for the faithful performance of the said contract must be made and be liable for the substantial completion of the entire canal system.

Water Rights Dedicated.

X. The certificate of shares of stock of the Salmon River Canal Company, Limited, shall be made to indicate and define the interests thereby represented in the said system, to-wit: A water right of one-hundredth of a cubic foot per second for each acre of land irrigated as provided in paragraphs IV. and VIII. of this contract and a proportionate interest in the said canal and irrigation works based upon the number of shares ultimately sold therein.

While the party of the second part shall retain control of the said Salmon River Canal Company,

Limited, water shall be measured to users from the place of division at the main laterals of such irrigation system in such quantities and at such times as the condition of the crops and the weather may determine but according to such rules and regulations, based upon a system of distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from said canal system.

It is agreed that said system of distribution by rotation shall be devised by the party of the second part and used by the Salmon River Canal Company, Limited, in case the necessity arises during the period while it retains the management of the Salmon River Canal Company, Limited.

The sale of the water rights to the purchasers shall be a dedication of the waters to the lands to which the same is to be applied. Water shall only be delivered through said system during the irrigation season, to-wit, between April 1st and November 1st of each year. A domestic supply when necessary outside of the irrigation season shall be delivered under such rules and regulations and under such terms and conditions as shall be determined by said Salmon River Canal Company, Limited.

Management of Water and Charges for Delivery.

XI. The party of the second part agrees to construct the said canal system so that the water conducted through the same may be available at a point not to exceed one-half mile measured in a direct line from each quarter section of land herein described

and to be irrigated and reclaimed by water conducted through said canals; that it will construct and place in position all head-gates, flumes, weirs and other devices for the control and measurement of water in the main canals and reservoirs and in the main laterals it being intended that the settler shall under the directions of the Chief Engineer of the second party build and furnish one gate or measuring device for his own use but that all other gates, weirs and measuring devices in the main canals, main or subordinate laterals shall be furnished and constructed by the second party.

Plans for measuring devices, head-gates and weirs are to be approved by the State Engineer. No charge shall be made to the purchaser for the delivery of water prior to the first day of January, 1911. For each succeeding year thereafter while the second party retains the control of the said Salmon River Canal Company, Limited, said company may charge and assess the purchasers of water rights in said irrigation system the sum of thirty-five cents (\$.35) per acre for each acre of land for which a water right has been purchased; said sum to be due and payable on the first day of March of each year. If the sum so raised shall be insufficient prior to January 1st, 1913, for the purpose of maintaining, operating and keeping in repair said system and paying the expenses of the management thereof, the said second party will furnish the additional funds necessary to supply such deficiency. After said date, the actual cost of maintenance is to be paid by the settler.

A main lateral, within the meaning of this contract, is a lateral taken from the main line of this canal. A subordinate lateral, within the meaning of this contract, is a lateral built for the purpose of conducting water from a main lateral to a point within half a mile of the place of intended use. A coulee or draw used as a main lateral shall also be included within these terms.

Completion of System.

XII. Said party of the second part agrees to begin work on said irrigation system within six months from the date of this contract and to complete 1-5 of the construction work within two years from this date; that the construction work shall be prosecuted diligently and continuously to completion and that a cessation of work under this contract for a period of six months after the second year without the sanction of the State Board of Land Commissioners will forfeit to the State all rights under this contract.

Second party agrees to have said canal system constructed in accordance with this contract within five years from the date hereof; it being understood, however, that detailed plans and specifications of said work have not yet been completed and that such detailed plans and specifications are to be approved by the State Engineer and that with his consent and the consent of the State Land Board alterations and changes may be made in the plans prepared and filed.

Forfeiture.

XIII. It is agreed that the rights of second party herein may be forfeited in accordance with the

laws of the State of Idaho relative to that subject which are now in force and effect.

Estimated Cost.

XIV. The estiated cost of the proposed irrigation works is \$2,500,000 and upwards and the price at which water rights are fixed herein and for which liens are hereby authorized and created against the separate legal sub-divisions of land herein described are deemed necessary in order to pay the costs and expenses of reclamation and interest thereon. The existing laws under which this contract is made are understood and agreed to be a part of this contract.

Description of Lands.

XV. The lands hereinbefore referred to are lands donated by the Act of Congress to the State of Idaho, under and pursuant to the Act of Congress approved August 18th, 1894, and the Amendments relating thereto, commonly called the Carey Act, and also other lands hereinafter described, the irrigation and reclamation of which lands this contract is designated to effect. The lands to be reclaimed under said "Carey Act" are fully set forth in the list herewith marked Exhibit "A" which is hereby referred to and made a part hereof.

Highways.

XVI. Entries of land are understood to be made subject to a right of way without compensation to the entrymen, for roads upon all exterior section lines, and also upon all half section lines which may be designated by the Board of County Commissioners as may be provided by law.

Water Supply.
For Cities and Towns.

XVII. It is understood and agreed that so much water as may be necessary for the use of cities and towns and the inhabitants thereof, which cities and towns must necessarily take their water supply from said system of canals, shall be furnished from said canal system to said cities and towns and the inhabitants thereof, upon such terms of sale or rental as may be agreed upon by the party of the second part and said cities and towns or the owners of the lands upon which the same are established or the inhabitants therein. Said cities and towns or the inhabitants thereof must contribute to the maintenance and support of said canal system in proportion to the amount of water used by them and shares of stock of the Salmon River Canal Company, Limited, shall be issued for the amounts of water represented by said use to the inhabitants thereof or to the trustees of any village or the mayor of any city in trust for the use and benefit of the towns and cities and inhabitants thereof.

Delivery of Water to Users.

XVIII. It is agreed that the said Salmon River Canal Company, Limited, shall not deliver water to or permit the use thereof from said irrigation system by persons who have not purchased water rights, or who are not holders of stock in said Salmon River Canal Company, Limited, or who are not otherwise entitled thereto under this contract.

Mortgage.

XIX. The right, title and interest of the second party in the irrigation works and system may be mortgaged, the form of such mortgage to be approved by the Attorney General of Idaho.

Amendments.

XX. This contract may be altered and amended by the first party with the consent of the second party for the purpose of carrying out the object of the contract and for the purpose of meeting any conditions now unforeseen.

Detailed plans and specifications shall be filed from time to time as the work progresses with the State Engineer and the State Land Board for their approval.

With the consent of the State Land Board, the irrigation system hereby contracted for may be enlarged by second party so as to cover lands not under the irrigation system, as at present designed, such extensions, however, to be a part of this system.

Coulees and Draws.

XXI. Coulees and draws may be used as waterways when convenient, but all coulees and draws utilized as laterals from which water is to be taken by settlers for irrigation shall be so constructed and improved as to practically conform to artificially constructed laterals of like capacity so that water may be available for use from the same, in practically the same manner and at approximately the same expense, and it is further agreed that the specifica-

tions as to the construction and improvement of said coulees and draws shall be filed from time to time as the work progresses with the State Engineer and the State Land Board for their approval, it being understood that this paragraph is to be liberally construed in order that no unnecessary improvement of coulees need be made.

With the consent of the State Land Board, changes may be made in the number, location and capacity of the reservoirs.

Whereas: All the requirements of the law have been, in so far as this contract is concerned, fully met and in every respect complied with; the execution of this contract is therefore ordered.

In Witness Whereof, The said party of the first part, the State of Idaho, has by resolution of its State Board of Land Commissioners caused this agreement to be signed in duplicate by its governor, who is ex-officio president of said State Board of Land Commissioners, and attested by the registrar of said Board.

And, the said party of the second part has hereunto caused its corporate name to be subscribed by its proper officer and to be duly attested, as provided by resolution of this Board of Directors.

STATE BOARD OF LAND COMMISSIONERS,

By F. N. GOODING,

Governor and Ex-officio President.

Attest:

M. J. CHURCH,

Registrar.

TWIN FALLS SALMON RIVER LAND AND
WATER CO., By W. S. KUHN,

Attest:

President.

A. E. DeBOIS,

Assistant Secretary.

Endorsed: Filed November 9th, 1914. A. L.
Richardson, Clerk. By E. B. Yarrington, Deputy.

PLAINTIFF'S EXHIBIT "C."
FILED WITH AMENDED COMPLAINT.

Contract No.....

TWIN FALLS SALMON RIVER LAND AND
WATER COMPANY.

AGREEMENT.

This Agreement, Made in duplicate this.....day
of.....,19..., between the TWIN FALLS
SALMON RIVER LAND AND WATER COM-
PANY (for convenience hereinafter called "the
Company"), a corporation organized and existing
under the laws of the State of Delaware, party of
the first part, and.....
(for convenience hereinafter called the "purchaser")
of....., State of.....,
party of the second part, witnesseth:

That the Company has heretofore entered into a
contract with the State of Idaho, acting by its State
Board of Land Commissioners, whereby the com-
pany bound itself to construct a system of canals

and irrigation works for the reclamation and irrigation of certain lands therein described and referred to, which contract is of record in the office of the Register of the State Board of Land Commissioners at Boise City, Idaho, and is dated April 30th, 1908, and is hereinafter called the "State contract."

That the Company has heretofore entered upon the work of construction of said irrigation system for the purpose of diverting from Salmon River the waters thereof under the appropriation of John E. Hays made December 29th, 1906, recorded in Book 8 of Water Rights, at page 2659, records of State Engineer's office of the State of Idaho, being permit No. 2659 issued by the State Engineer of Idaho, together with other water rights taken for use on the lands hereinafter described.

That the State Board of Land Commissioners, pursuant to law and its rules and regulations, has notified the Company that it may proceed to sell or contract rights to the use of water flowing and to flow through the canals and rights to and in said system of irrigation works, pursuant to law and to the terms of said contract with the State.

That the purchaser has made application to the Company to be permitted to purchase, upon the terms hereinafter set forth, the rights and privileges by said contract guaranteed, to the extent hereinafter named, which said application has been accepted by the Company subject to the approval of the State Board of Land Commissioners, whose approval, pre-

vious to the delivery hereof, has been by its Register endorsed hereon.

That in consideration of the sum of Dollars, cash in hand paid this day by the purchaser to the Company and in consideration of the covenants and agreements hereinafter contained, it is agreed that in pursuance of the contract between the Company and the State, hereinafter called the State Contract, that the purchaser shall become entitled to shares of the capital stock of the Salmon River Canal Company, Limited, the certificate thereof to be in the form as follows, to-wit:

SALMON RIVER CANAL COMPANY, LIMITED.

. Shares., 19 . . .

This is to certify is the owner of shares of the capital stock of the Salmon River Canal Company, Limited.

This certificate entitles the owner thereof to receive one-hundredth of a cubic foot of water per acre per second of time for the following described land:

.
.

in accordance with the terms of the contract between the State of Idaho and the Twin Falls Salmon River Land and Water Company and this certificate also entitles the owner to a proportionate interest in the dam, canal, water rights and all other rights and franchises of the Twin Falls Salmon River Land and Water Company, based upon the number of shares

finally sold in accordance with the said contract between the said company and the State of Idaho.

SALMON RIVER CANAL COMPANY, LIMITED.

By.....
President.

Attest:
Secretary.

Said certificate to be delivered as provided for in said State Contract and under the conditions therein stated.

The water which the purchaser shall have the right to conduct and receive through the said canal system shall be used upon and the water shall become dedicated and be appurtenant to the following described land and no other, to-wit:

.....
Section
Township.....South of Range.....
East, B. M., containing.....acres in Twin Falls County, State of Idaho.

And the parties hereto expressly agree as follows, to-wit:

1. This agreement is made in accordance with the provisions of said contract between the State of Idaho and the Company, which, together with the laws of the State of Idaho under which this agreement is made, shall be regarded as defining the rights of the respective parties, and shall regulate the provisions of the shares of stock to be issued to the purchaser by the Salmon River Canal Company, Limited.

2. The Company agrees that so long as it retains control of the Salmon River Canal Company, Limited, to-wit, so long as it shall continue to vote a majority of the stock of said Company, as provided by the State Contract, that it will cause said Company to keep and maintain the said irrigation system in good order and condition and to cause any necessary repairs thereto to be made as soon as practicable and expedient.

Said Salmon River Canal Company, Limited, is to have power to levy all necessary tolls, charges and assessments upon all users of water in proportion to their respective holdings of stock, whether water is used or not, and the Company hereby agrees that no charges shall be made for the delivery of water from this date until after the first day of January, 1911, and that thereafter the annual charge for maintenance shall not, during the period prescribed in the State contract, exceed the sum of 35 cents for each and every acre, to be charged against the entire acreage entered irrespective of the irrigation thereof. The purchaser agrees to pay said charges at the office of the Salmon River Canal Company, Limited, on the first day of April of each year without notice.

3. The consideration for the water rights hereby agreed to be conveyed is the sum of \$....., and the balance thereof remaining due after the cash payment hereinbefore acknowledged, to-wit, the sum of \$....., is due and payable as follows, to-wit:

	DUE	PRINCIPAL	INTEREST	AMOUNT
1st Deferred Payment.....	\$.....	\$.....	\$.....
2nd Deferred Payment.....
3rd Deferred Payment.....
4th Deferred Payment.....
5th Deferred Payment.....
6th Deferred Payment.....
7th Deferred Payment.....
8th Deferred Payment.....
9th Deferred Payment.....
10th Deferred Payment.....
11th Deferred Payment.....

Interest from.....at 6 per cent per annum shall be paid annually but if interest is not paid within thirty days from the date the same falls due then in such case it shall be computed for the entire period at the rate of eight per cent per annum.

All interest accruing prior to the date on which notice is given to the entryman that the Company is prepared to furnish water under the terms of this contract is hereby waived.

4. The purchaser hereby covenants and agrees that upon default in the payment of any of the payments above specified, or of the interest thereon, or any annual charge, toll or assessment, for the operation and maintenance of the irrigation system hereinbefore provided for, the Company may declare the entire amount of the principal purchase price for said water rights, due, and may proceed either in law or equity to collect the same, and to enforce any lien which it may have upon the water rights hereby contracted, or upon the lands to which said water rights are dedicated or may at its option proceed to enforce any remedy given by the laws of Idaho to the Company against the purchaser.

And the purchaser hereby further covenants that he will and by these presents does hereby grant, assign, transfer and set over by way of mortgage or pledge to the Company to secure the payment of the amounts due and to become due on the purchase price of the water right hereby contracted to be sold any and all interest, and all rights which he now has or

which may hereafter accrue to him under his contract with the State of Idaho, for the purchase of the lands to which the water rights hereby contracted for are dedicated, and further that immediately upon transfer to him of the legal title to said lands or any part thereof, he will, upon demand, execute to the Company, in proper form, a mortgage or deed of trust with power of sale in such form as may be approved by the State Board of Land Commissioners to secure the performance by him of the provisions of this contract, which said mortgage the purchaser hereby covenants and agrees shall be a first lien upon the lands so mortgaged, superior to any and every incumbrance in favor of any persons whomsoever.

5. The purchaser agrees that the shares of stock purchased in the Salmon River Canal Company, Limited, shall be and they are hereby assigned and transferred to the Company and said Company and its agents are hereby authorized and empowered to vote said stock in such manner as it or its agents may deem proper at all meetings of the stockholders of said Company until 35 per cent of the purchase price of said stock has been paid.

6. It is agreed that no water shall be delivered to the purchaser from said irrigation system while any installment of principal or interest is due and unpaid from the purchaser to the Company or while any toll or assessment is due and unpaid from the purchaser to the Salmon River Canal Company, Limited. Water shall only be delivered through said irrigation system during the irrigation season, be-

tween April 1st and November 1st of each year. A domestic supply when necessary outside of the irrigation season shall be delivered under such rules and regulations and under such terms and conditions as shall be determined by said Salmon River Canal Company, Limited.

7. This contract may be assigned by the Company and thereupon the payment of principal and interest if so provided shall be due and payable to the assignee but the payments for tolls, assessments and charges for the delivery of water shall, unless otherwise provided, be paid to the Salmon River Canal Company, Limited, and payment thereof may be enforced by it.

8. This contract is made pursuant to and subject to the Contract between the Company and the State of Idaho and the existing laws of said State.

The entry of the above described lands is made subject to the right-of-way of the Idaho and Nevada Southern Railroad Company, provided it has filed the map of its line with the State Board of Land Commissioners prior to June 1, 1908. No charge for a water right shall be made for the land taken for the right-of-way. No compensation shall be paid the entryman for such right-of-way. The right-of-way shall not exceed one hundred feet on each side of the center line of the track.

9. All notices given to second party by the State Board of Land Commissioners or by the first party hereto or its assigns may be sent to second party by mail addressed to.....

IN WITNESS WHEREOF, The parties have hereunto subscribed their names, and the Company has caused its seal to be affixed the day and year above written in duplicate.

TWIN FALLS SALMON RIVER LAND AND WATER COMPANY,

By....., Vice President

....., Asst. Secretary

....., Purchaser

By....., Attorney in Fact

In the presence of

.....

.....

Witnesses.

STATE OF..... }
COUNTY OF..... } ss.

On this.....day of.....,
in the year 19..., before me,.....,
a Notary Public in and for said County, personally
appeared....., known to
me to be the person whose name is subscribed to the
above instrument and acknowledged to me that he
executed the same.

Attest my hand and official seal the day and year
in this certificate first above written.

.....

(SEAL)

Notary Public.

My commission expires.....

STATE OF..... }
COUNTY OF..... } ss.

On this.....day of.....,

in the year 19..., before me,.....,
 a Notary Public in and for said County, personally
 appeared....., known to
 me to be the person whose name is subscribed to the
 above instrument as the attorney in fact of.....
and acknowledged to me that he sub-
 scribed the name of.....
 thereto as principal and his own name as attorney
 in fact.

Attest my hand and official seal the day and year
 in this certificate first above written.

.....

(SEAL)

Notary Public.

My commission expires.....

I hereby certify that the above is a true copy of
 the original contract in the above matter.

Attest:

Assistant Secretary Twin Falls Salmon River
 Land and Water Company.

The foregoing contract is hereby approved, and
 has been registered this.....day of
, 19....

STATE BOARD OF LAND COMMISSIONERS,

By, Register.

Endorsed: Filed Nov. 9th, 1914. A. L. Richard-
 son, Clerk. By E. B. Yarrington, Deputy.

(Title of Court and Cause.)

MOTION TO DISMISS.

Comes Now the defendant, the Twin Falls Salmon
 River Land and Water Company, and moves the

Court to dismiss the amended bill of complaint herein upon the following grounds:

1. That the amended bill of complaint does not state facts sufficient to entitle the complainant to any relief, there being no equity stated in the amended bill.

2. That there is a non-joinder of necessary parties complainant, in that all of the persons interested in the subject matter of the controversy and who may be interested with the complainant are not joined as plaintiffs in the action.

3. That there is a non-joinder of necessary parties, in that all of the persons adversely interested to the complainant are not made defendants.

Wherefore, said defendant prays that the amended bill of complaint herein may be dismissed.

S. H. HAYS,

Attorney for Twin Falls Salmon River Land and Water Company, residing at Boise, Idaho.

Endorsed: Filed Dec. 17, 1914. A. L. Richardson, Clerk.

At a stated term of the District Court of the United States for the District of Idaho, held at Boise, Idaho, on Thursday, the 17th day of December, 1914.

Present: Honorable Frank S. Dietrich, Judge.
A. E. CALDWELL, et al.,

vs.

TWIN FALLS SALMON RIVER LAND & WATER COMPANY, et al.

On this day this cause came on to be heard upon the defendants' motion to dismiss said cause and after argument by the respective counsel the court ordered that said motion to dismiss be and the same is hereby denied.

(Title of Court and Cause.)

In Equity No. 494.

AMENDED ANSWER OF TWIN FALLS SALMON RIVER LAND & WATER COMPANY TO AMENDED BILL OF COMPLAINT. ALSO CROSS-BILL.

Comes now the defendant herein, the Twin Falls Salmon River Land and Water Company, a corporation, answering the amended bill of complaint herein and says:

1.

Admits the allegations contained in paragraph one of the amended bill herein.

2.

Admits the allegations contained in paragraph two of the amended bill herein.

3.

Admits the allegations contained in paragraph three of the amended bill herein.

4.

Admits the allegations contained in paragraph four of the amended bill herein.

5.

Admits the allegations contained in paragraph five of the amended bill herein.

6.

Admits the allegations contained in paragraph six of the amended bill herein.

7.

Admits that the Twin Falls Salmon River Land and Water Company made and entered into a contract with the State of Idaho, a copy of which contract is attached to and filed with the amended bill herein and marked Exhibit "A," and made a part thereof and which is referred to in the said amended bill as the State Contract, and contracted as therein specified and not otherwise.

8.

That it was understood and agreed by and between the Twin Falls Salmon River Land and Water Company and the State of Idaho, in and by said agreement, that said defendant should have the right to sell water rights or shares in the said irrigation system as provided and set forth in said contract, Exhibit "A," and not otherwise.

9.

Defendant admits that on or about the first day of June, 1908, the complainant, A. E. Caldwell, by himself or his predecessor in interest, made entry of the lands described in paragraph nine of the amended bill herein and purchased or contracted to purchase one hundred sixty (160) shares of stock in the Salmon River Canal Company, Limited, rep-

resenting the water right for said lands and that said Caldwell at said time entered into an agreement in writing for said purpose, said agreement or contract being commonly known as the Settler's Contract and being in the form Exhibit "C" attached to the amended bill herein.

10.

Defendant admits that the complainants herein, and various other settlers mentioned in the amended bill herein, on the first day of June, 1908, and at various times thereafter, made entries similar to the entry of the complainant Caldwell for various tracts of land within the limits of the irrigation project designated in Exhibits "A" and "B" referred to in the amended bill and that the said settlers or entrymen of lands under said irrigation project described in said Exhibit "A" made and entered into contracts similar in form to the contract Exhibit "C," commonly known as the Settler's Contract. That defendant does not know whether the list Exhibit "B" is correct or not, and therefore denies that said list is a correct list.

11.

Defendant admits that on or about the first day of June, 1908, and prior to the filing of the bill herein, that the defendant, the Twin Falls Salmon River Land and Water Company, entered into contracts with divers persons who made entry of lands under the said irrigation project described in said Exhibit "A" and commonly referred to as the Salmon River Segregation in the form Exhibit "C" and covering

approximately 73,000, but not 75,000 acres of land, and that the rights of the said parties holding said contracts are in accordance with said contracts and with the said contract, Exhibit "A," and not otherwise, and that said parties have no rights except such as are conferred by the said contracts, Exhibits "A" and "C."

That entrymen on approximately fifteen thousand (15,000) acres of land within said area of 73,000 acres, who had contracted and agreed in the form of the contract Exhibit "C" to purchase shares representing water rights in the said irrigation system to the extent of approximately fifteen thousand (15,000) shares have, as defendant is informed and believes, failed and neglected to settle upon, cultivate or improve their lands as required by law and for that reason the entries of land on said segregation have become void and of no force and effect and are subject to cancellation at any time and that for this reason there are not now outstanding valid settlers' contracts, as defendant is informed and believes, for more than sixty thousand (60,000) shares or water rights in the said irrigation works representing approximately 60,000 acres of land in said segregation.

12.

That it was understood, agreed and contemplated by the terms of the said State Contract, Exhibit "A," and said settler's contract, Exhibit "C," hereinbefore referred to as is stated, set forth and agreed in said contracts and not otherwise.

13.

Defendant avers that the appropriation provided for by the State Contract for the irrigation works and system referred to in the amended bill herein consists of the flow of Salmon River together with its tributaries and drainage thereof above the point of diversion and none other; that the normal flow of the stream fluctuates to a great extent and that therefore, under the terms of the Contract, Exhibit "A," it was provided that water should be stored for irrigation purposes. Defendant denies that the dam or reservoir, or either of them, lose a great deal of water by seepage or evaporation, or any amount in excess of the normal and customary amounts under such circumstances, and defendant denies the amount of water so lost is or will continue to be very great. Defendant denies that a great deal of water is lost in transportation from the dam or reservoir to the various farm units, or that any water is lost in transportation from the dam or reservoir to the various farm units in excess of the customary or usual amount under such circumstances, and denies that the same is or will continue to be very great. Defendant denies that the amount of the available supply of water for use on the several land entries referred to in the amended bill after deducting the loss mentioned in paragraph thirteen of the amended bill herein is or will be inadequate to irrigate the acreage entered upon and under water contracts sold, and denies that the said available supply of water for use on the several land entries will not

exceed 50,000 acre feet or that it cannot be determined that more than 50,000 acre feet of water will be available for the use of the water right holders under said irrigation works delivered at a distance of one-half mile from each quarter section of land under said segregation.

14.

Defendant denies that in order to comply with the provisions of the Carey Act, or to irrigate or reclaim the lands mentioned in the amended bill herein or to reclaim said land or to raise ordinary agriculture crops thereon, that at least one-half miner's inch per acre continuous flow of water throughout the entire irrigation season, or at least two and three-fourths ($2\frac{3}{4}$) acre feet of water per acre, if delivered by periods of rotation as the needs of the crops demand (said amount of water to be delivered within one-half mile of the respective land entries), is or will continue to be necessary, and defendant denies that a less amount or any less amount will be wholly or at all insufficient to raise ordinary agricultural crops, or that a less amount will not enable the complainants and settlers upon said tract to comply with the Carey Act regarding a permanent water supply to reclaim said land or enable them to farm or cultivate their land profitably and defendant denies that unless the complainants and all settlers upon said Salmon Tract are able to secure the amount of water claimed in paragraph fourteen of the amended bill for their land that a great deal or any of such land will remain idle or unproductive or

that the owners or holders thereof will suffer great or irreparable injury or damage or any injury or damage whatever.

15.

Defendant avers that it was provided for and contemplated by the said State Contract, Exhibit "A," and the said Settler's contract, Exhibit "C," that water should be furnished and delivered in accordance with the terms of said contracts and not otherwise, or that it should be delivered at any place other than that specified in the said contract, or that it should be delivered in any amount, time or manner except in accordance with an efficient administration of the water supply and a skillful use thereof by the farmer, or in any manner other than to enable the farmer to raise the crops suitable to the existing conditions, and defendant denies that it was provided or contemplated by the said State Contract and the Settler's Contract that the water right purchased by the complainants and other settlers on said tract per share or acre was or would be a right to receive one one-hundredth of a cubic foot of water per acre per second of time equal to one-half miner's inch for each acre of land irrigated by a continuous flow during an entire irrigation season extending from April 1st to November 1st of each year, or an equal or proportionate amount if delivered by rotation or by periods of time and defendant denies that the irrigation season extends from the first day of April to the first day of November of each year but alleges that the irrigation season fluctuates from

year to year, and defendant avers that the State Contract, Exhibit "A," was made and entered into after an investigation and examination by the State Engineer of the State of Idaho of the water supply available for the irrigation of the lands described in Exhibit "A"; that the State Engineer of the State of Idaho made report to the State Board of Land Commissioners of said State in pursuance of law that the water supply was sufficient for the irrigation of the said lands described in said Exhibit "A" and which were thrown open for entry and that after said report by the said State Engineer, the State Board of Land Commissioners of the State of Idaho made and entered into said Contract, Exhibit "A."

16.

Defendant denies that at or prior to the time of the making of the settler's contract herein, it was represented to complainants or to other purchasers of water rights or shares in said irrigation system by this defendant that ample water was available to supply the rights of these complainants and all of the settlers on said system or that any representations whatever were made other than as appear in said contracts Exhibits "A" and "C," and denies that the complainants or a large number of settlers on said tract relied upon any representations, made by this defendant and that relying upon such representations cleared their lands or a large portion thereof and have planted such land with crops which are now growing upon said land.

17.

Defendant denies that it has failed or neglected or refused or that it still fails or neglects or refuses to comply with the terms or conditions of the State Contract hereinbefore referred to in any respect whatever either as set up in paragraph seventeen of the amended bill herein or otherwise, and denies that it has or that it still fails, neglects or refuses to so construct its irrigation system as to make water available in ample or sufficient quantities to furnish complainants or other settlers upon said tract with the water necessary for the reclamation of their lands as provided in said contracts and defendant denies that in violation of its contract or otherwise with the State of Idaho, herein referred to as the State Contract, that it sold a large or any number of water contracts or shares in the said irrigation system described in said Exhibit "A," by the terms of which it undertook to furnish to such water-contract holders a great or any amount of water in excess of the appropriation of water made by the defendant or assigned to it and referred to in said State Contract, and defendant denies that it has sold or delivered a large or any amount of water from its reservoir system to persons or corporations other than actual settlers or contract holders upon said segregation and denies that it has sold or delivered, or that it still sells or delivers from the irrigation and reservoir system mentioned in the amended bill herein a large or any amount of water to persons or corporations other than settlers upon said Salmon River Tract mentioned in the amended bill herein.

Defendant further avers that as it is advised and believes, the Salmon River Canal Company, Limited, loaned a certain amount of water not to exceed 1,000 acre feet to persons who obtained an order or request therefor from stockholders of said company during a short time in the season of 1914, which water was later to be returned, but that this defendant has no intention or purpose of selling or disposing of any waters other than to persons holding contracts in the form Exhibit "C."

18.

Defendant denies that it has failed or neglected or refused to comply with the terms or conditions of the said State Contract, Exhibit "A," or the Settler's Contract, Exhibit "C," herein referred to in any respect or at all, or that it has failed or neglected or refused to supply an ample or sufficient supply of water to the complainants or either or any of them, or to any of the other settlers upon said tract, or to either or any of them, or that it has failed or neglected or refused to supply an amount of water in excess of about three-fourths of an acre foot per acre, and defendant denies that approximately three-fourths of an acre foot of water per acre is the only amount now or heretofore available for the use of all of the land under said segregation. Defendant further avers that the only source of water supply for the said tract is the said Salmon River and its tributaries above the point of diversion of the dam described in said Exhibit "A."

19.

That defendant has no knowledge, information or belief concerning the matters set up in paragraph nineteen of the amended bill herein and therefore denies each and every of the allegations therein contained, and defendant further denies that the said State Board of Land Commissioners were either justified by any facts or authorized by any law to take the action or any of the actions demanded by the complainants herein in paragraph nineteen of the amended bill herein or that the said State Board of Land Commissioners had any right or authority to bring any action in court in regard to any of the said matters in said paragraph of said amended bill and denies that the said State Board of Land Commissioners had any right, power or authority to require the defendant herein to procure the additional supply of water for the irrigation works mentioned in the complaint or to reduce the acreage of land mentioned or to cancel, or annul any of the contracts already entered into between the settlers and the defendant herein. Defendant admits that said Land Board has the power and that it is its duty to cancel entries of land under said system in case of a failure to comply with the law as to residence or cultivation.

20.

Defendant denies that the Department of the Interior is now or at any time has withheld its decision for the issuance of the patents for lands under said irrigation works pending proof that said land had been reclaimed within the contemplation of the pro-

visions of the Carey Act, or that it has heretofore notified the State Land Board of the State of Idaho that the acreage in said segregation must be reduced because of the insufficiency of the water.

21.

Defendant denies that an additional water supply is necessary to be supplied to the said segregation so as to furnish each acre with the amount of water necessary for the irrigation thereof and denies that if additional water is not furnished, or if water contracts be not canceled and the acreage of said segregation reduced, that the complainants or either or any of them, or other contract holders, or either or any of them, will suffer great or irreparable injury or any injury whatever and defendant denies that if the contract holder entitled to receive water is furnished only the proportionate amount of water now available that the entire or any portion of the segregation will be spotted with uncultivated areas, or any uncultivated areas whatever, or that there will be areas not properly cultivated because of an insufficient water supply.

22.

Defendant denies that the balance due under and by virtue of the terms and conditions of the State Contract and the Settler's Contracts and because of any failure on the part of the defendant to comply with the terms or conditions of said State Contract, and the said Settler's Contract that the balance due from the complainants or either or any of them, or from the settlers on the tract, or either or any of

them, was intended to be or should be or does constitute a trust fund for the purpose of carrying out the terms or conditions of the State Contract, or the Settler's Contracts for the purpose of the Carey Act, or particularly to supply entrymen and contract holders with a supply of water in a substantial ditch as claimed in the amended bill herein. Defendant admits that there is now due from the complainants and from the contract holders under said project as it now exists a sum equal to and in excess of about thirty-seven (\$37.00) dollars per acre or a total of about two million seven hundred seventy-five thousand dollars (\$2,775,000.00).

23.

Defendant denies that since it has notified settlers under its system that water was available for delivery that it has through the defendant, the Salmon River Canal Company, Limited, collected large sums of money from water-contract holders including the complainants, ostensibly for maintenance charges but that in reality such sums and a great portion thereof, were used in the payment of excessive and illegal salaries and expenses of the officers, employees or attorneys of this defendant and denies that this defendant through the Salmon River Canal Company, Limited, at the times or in the manner stated in paragraph twenty-three of the amended bill herein collected such maintenance charges from all water-contract holders upon said segregation although only a portion of the water contracted to be delivered was in fact delivered; denies that this defendant fraudu-

lently or otherwise applied such maintenance charges so collected as stated in the amended bill herein in paying either excessive or illegal salaries of employees or attorneys, or paying exorbitant rent for buildings or in the purchase of equipment for its own use or benefit or for the use or benefit of its kindred projects or any of them and not for the use and benefit of said Salmon River Canal Company, Limited, and defendant further avers that all maintenance charges and assessments, as it is informed and believes, that had been made by the Salmon River Canal Company, Limited, have been charged only against such persons as were legally liable therefor and only in proper amounts, and that only proper payments were made out of said fund.

24.

Defendant denies that the Twin Falls Salmon River Land and Water Company is insolvent or unable to respond in damages to the complainants or other holders of contracts on said tract and denies that unless the several or total amounts due from complainants or other contract holders be treated as a trust fund to carry out the terms and conditions of the said State Contract and the Settler's Contract, that the complainants or any of them or all contract holders, or any of them under said segregation, will be without adequate remedy, or will suffer great or irreparable loss or injury, or that said irrigation system will be a failure or that said segregation and no part thereof will be entitled to patent from the United States.

25.

Defendant avers that no additional supply of water is necessary to irrigate the lands now entered upon said segregation or for which water contracts have been issued and deny that said irrigation project cannot be made a success unless a tract of land not to exceed 30,000 acres in extent be set apart as land subject to water rights and that all other lands on said segregation be released and declared to be without a water right thereon.

26.

Defendant avers that the rights of the settlers and water-contract holders under said irrigation project are for a proportionate interest in the said water rights and irrigation works described in Exhibit "A," and that all contract holders are entitled to a proportionate part of the water supply and a proportionate part in the irrigation works and the rights appurtenant thereto, and defendant denies that unless the relative rights of the entrymen are fixed by an order or decree of the court that the amount of the acreage under cultivation will be so great that water will not be sufficient to irrigate the same but only a small portion thereof and denies that great confusion, trouble or injury will result to all or any persons holding water rights in said system, or that a multiplicity of suits prosecuted by such persons so interested will follow. Defendant further avers that under the terms of the Contract, Exhibit "A," that the said irrigation system, as fast as the same was completed for operation, was to be turned

over to the Salmon River Canal Company, Limited. That the same was completed for operation; that the certificate of the Chief Engineer of the Salmon River Canal Company, Limited, was made as provided by Exhibit "A" and that the same was presented to the State Engineer of the State of Idaho, who approved the same, and transmitted the same to the State Board of Land Commissioners, but that no order has ever been made by the State Board of Land Commissioners of the State of Idaho turning over the said system or any portion thereof for operation to the Salmon River Canal Company, Limited, although said Salmon River Canal Company, Limited, was properly entitled to have said system turned over for such purpose; that in actual practice, said Salmon River Canal Company, Limited, has taken possession and control of the said system and operated the same.

27.

Defendant avers that the Salmon River Canal Company, Limited, is in control of said irrigation system in the manner and under the conditions above set forth but denies that the same is under the dominion of the defendant, the Twin Falls Salmon River Land & Water Company, or that the Twin Falls Salmon River Land & Water Company has any power or authority over said Salmon River Canal Company, Limited, except as may arise from the conditions of the contracts Exhibits "A" and "C"; that the length of time that the Twin Falls Salmon River Land & Water Company will continue to vote the stock in the

Salmon River Canal Company, Limited, of the various plaintiffs and other settlers upon said irrigation project depends entirely upon the promptness with which the payments are made upon the water contracts known as the Settlers' Contracts, Exhibit "C"; that the votes electing the present Board of Directors of the Salmon River Canal Company, Limited, were cast chiefly by the Twin Falls Salmon River Land and Water Company under the authority given in the contracts Exhibits "A" and "C," and defendant denies that all of the officers of the Salmon River Canal Company, Limited, are the agents of this defendant, and defendant denies that the interests of all of the settlers on the Salmon River Tract, or the owners or holders of contracts in said irrigation works are adverse except in this case to the interest of this defendant and defendant denies that it has refused or that it still refuses to take any steps to protect the interests of the Salmon River Canal Company, Limited, in the matters set forth in the amended bill herein, or that it has in any manner been requested to take any steps whatever in this matter and further denies that the Salmon River Canal Company, Limited, has in any manner been requested to take any action with regard to any of the matters set forth in the bill herein or to bring any suit thereon, and defendant denies that the complainants are compelled to institute this action not only in their own behalf but in the behalf of and for the benefit of all settlers and water-contract holders on said tract, or for the benefit of the Salmon River Canal Company, Limited, and defend-

ant denies that it would be useless to demand or ask the defendant, the Salmon River Canal Company, Limited, to institute or prosecute this action.

28.

Defendant avers that the Salmon River Canal Company, Limited, controls the distribution of water in the irrigation works herein referred to to the consumers and that the Twin Falls Salmon River Land and Water Company does not control such distribution and defendant denies that it or the Salmon River Canal Company, Limited, have refused or still refuses to supply complainants or any of them, or other contract-holders or any of them upon said tract the water as contemplated or constructed or provided in the State Contract, and the Settler's Contract Exhibits "A" and "C," or that this defendant or the said Salmon River Canal Company, Limited, have fraudulently pretended that the water heretofore supplied is ample for the acreage entered and defendant denies that it or the Salmon River Canal Company, Limited, have refused to deliver water in the quantities contemplated by the said contracts Exhibit "A" and "C" as required thereby and denies that in fact this defendant or the said Salmon River Canal Company, Limited, delivered water to such settlers or any settlers, including the complainants, or any of them, in a very much less amount; denies that unless this court during the pendency of this action appoints a receiver or receivers, or takes possession of said irrigation works or operates the same for the benefit of those entitled to water therefrom, that this defendant will

continue to oppress these complainants or any of them, or the settlers on said tract or any of them, and denies that any acts of this defendant will result in the multiplicity of suits; denies that this defendant or the Salmon River Canal Company, Limited, have refused or still refuse to adopt a reasonable or proper system of delivery of water, or one required by the conditions of the crops or that they or either of them have refused or still refuse or that they will continue to refuse to recognize the rights of the complainants and other settlers upon said tract, or either or any of them, but allege that the said water will be furnished and delivered according to the best methods of practice and in pursuance of the contracts Exhibit "A" and "C" and defendant denies that it or the Salmon River Canal Company, Limited, have not delivered or will not deliver an ample supply of water during any period of delivery or as the needs of the crops require, and defendant denies that the results of its methods or system of delivery has been to cause hardship or annoyance or loss of crops, and denies that to continue its method of water delivery will produce great or any loss or damage, or numerous claims for off-sets and reimbursements from the several amounts due from settlers or that it will greatly affect the funds so due or the collection thereof and defendant denies that the collection of the funds due from the settlers cannot be effectually accomplished without the aid of a receiver or without the appointment of a receiver for the operation of the irrigation works.

29.

Defendant admits that prior to the first day of June, 1908, and prior to the time of the making of any land entries by any settler upon said Salmon Tract that it executed a deed of trust to the defendant, the American Trust & Savings Bank, Trustee, as set forth in the answer of the said trustee filed herein and defendant alleges that said trust deed did create a valid lien upon all of the property therein described and defendant admits that it assigned to the said trustee a larger portion of the water contracts made with settlers upon said tract.

30.

Defendant admits the allegations contained in paragraph thirty of the amended bill.

31.

Defendant denies that it has failed or neglected or refused to comply with the terms or conditions of the said State Contract, Exhibit "A," or the Settler's Contract in the form Exhibit "C," or that it has failed, or neglected or refused, or that it still fails, neglects or refuses to complete its irrigation system in any respect or at all so as to comply with the terms and conditions of the said contracts, Exhibits "A" and "C," or to furnish or make available the water required by it to be furnished to the contract holders in accordance with the terms or conditions of the said State Contract and said Settlers' Contracts, Exhibits "A" and "C" and denies that the pretended lien of the trust deed is subject or subordinate to the rights

of the purchasers of shares or water rights in said irrigation system but alleges the said deed of trust was taken subject to and in pursuance of the said Contract Exhibit "A," which contract authorized the making thereof and denies that said trust deed is null or void or of no effect as against the complainants, or any of them, or against the other water-contract holders in said irrigation system, or any of them.

32.

Defendant admits the making of the assignment mentioned in paragraph thirty-two of the amended bill and alleges that the same is regular and valid and not pretended.

33.

Defendant denies that the said assignment referred to in the amended bill in paragraphs thirty-two and thirty-three thereof was made without a valuable consideration.

34.

Defendant denies that the questions sought to be determined in this action are of common or general interest to all settlers upon said Salmon Tract, or to all water-contract holders thereon and denies that they constitute a class so numerous as to make it impracticable to bring them all before the court.

35.

Defendant denies that the complainants or any of them, or the other settlers upon said Salmon Tract, or any of them, have not a plain, speedy or adequate

remedy at law, or that they will suffer great or irreparable wrong or injury unless the court grants the relief prayed for.

And further answering, defendant says that the amount of water claimed as necessary in the amended bill herein for the use of the plaintiffs and others upon said tract is an amount in excess of that required for beneficial use and that the use of the amount of water as set forth as being demanded in the amended bill herein upon the lands described in said bill would be injurious to said lands and would result in the depreciation of the security afforded by the water contracts commonly called the settlers' contracts in the form Exhibit "C," and would impair the security covered by the lien granted under the statute to the Twin Falls Salmon River Land and Water Company herein.

36.

CROSS-BILL.

And the Twin Falls Salmon River Land and Water Company, by way of cross-bill herein against the plaintiffs above mentioned and all in whose behalf they may be acting, and also by way of counter-claim and further answer, avers as follows:

That on account of the soil and physical conditions existing upon said Salmon tract and upon the lands to the north thereof which are likely to receive the drainage therefrom, that it is absolutely essential for the best interests of the said Salmon River Tract and of all of the settlers thereon, that

very great care should be used in the application of water to said lands for irrigation purposes and also in regard to the amount thereof which is applied for said purpose, and if great care is not used in the irrigation of said lands, that a large area thereof will become valueless and the security afforded by the water contracts hereinbefore mentioned will become lost and that large numbers of suits will be brought by persons upon adjoining tracts for injury to lands done by reason of waste and seepage waters from the Salmon tract.

That it is necessary for the settlers upon said tract to use great skill in the application of water to their said lands and for the Salmon River Canal Company and the Twin Falls Salmon River Land and Water Company to cause only so much water as may be necessarily required for the irrigation of crops to be run into said canals described in the contract Exhibit "A."

That the application of the amount of water demanded by the plaintiffs in the amended bill herein and the manner of use desired and demanded therein would result in great damage and injury to a large portion of the lands on the said Salmon tract and in the destruction of the security afforded to the Twin Falls Salmon River Land & Water Company and its successors in interest under the terms of the water contract, Exhibit "C."

That under the terms of the contract, Exhibit "A" (Par. X of said contract), attached to the amended bill herein, it is the duty of the Twin Falls Salmon

River Land and Water Company, while it shall retain control of the said Salmon River Canal Company, as specified in said contract, Exhibit "A," to cause water to be measured to users from the place of diversion at the main laterals of the irrigation system in such quantities and at such times as the condition of the crops and weather may determine but according to such rules and regulations based upon a system of distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from said canal system.

That the use of a rotation system is necessary in the distribution of the water to settlers on said tract in order that the minimum amount of injury may be done to the lands irrigated from said canal system and in order that the security represented by the water contracts mentioned in the amended bill herein may not be impaired and also for the purpose of most equitably and efficiently distributing the water supply in order that effective use may be made thereof by all of the settlers upon said tract and in order that an unnecessary amount of water may not be used.

That the plaintiffs herein are members and officers of a settlers' association, being a voluntary association organized by a portion of the settlers on said project and that the said settlers' association and the plaintiffs in the amended bill herein, the officers thereof, have joined together and conspired to prevent the use of a rotation system in the

use of water and to prevent the use of water on said tract under proper and suitable rules and regulations in accordance with the terms of the said contract, Exhibit "A," and to prevent the proper and suitable distribution of the water supply under suitable rules and regulations now in use and those which will hereafter be made, and that they will continue to so join together and conspire and to bring numerous and vexatious suits in regard to said matter unless restrained by the order of this court; that the plaintiffs herein are acting for themselves and for other persons members of the said water users' association; that the joining together and conspiring and bringing of the suits above mentioned are adverse to the interests of the settlers and water users on said tract not members of the settlers' association; that it is the duty of the Twin Falls Salmon River Land and Water Company and of the Salmon River Canal Company, Limited, to handle and distribute the water supply in such manner as will best protect and serve the interests of all the users of water from the canal system and that this cannot be done unless the rules and regulations prescribed by the Twin Falls Salmon River Land & Water Company and the Salmon River Canal Company are complied with and unless a proper and suitable system of the distribution of water by rotation is maintained.

That unless said rules and regulations are reserved and said system of rotation maintained, it will be impossible to distribute the water supply to the irrigators upon said tract in such manner as will

best protect and serve the interests of all of the users of water from said canal system and the security represented by the contracts made in the form, Exhibit "C," will be greatly impaired and in part destroyed.

Wherefore, The Twin Falls Salmon River Land and Water Company prays that the amended bill of the plaintiff herein may be dismissed and that the plaintiffs herein and all members of the Settlers' Association, of which said plaintiffs are members and officers, be enjoined and restrained from bringing any suits or in any manner interfering with the delivery and distribution of the water supply through the irrigation system herein mentioned, according to the rules and regulations established therefor and in accordance with the rotation system and said Twin Falls Salmon River Land and Water Company prays that all proper relief may be granted herein.

S. H. HAYS,
Attorney for Defendant,
Residing at Boise, Idaho.

Duly verified. Endorsed: Filed March 29, 1915.
A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

In Equity No. 494.

ANSWER OF SALMON RIVER CANAL COMPANY, LIMITED, TO AMENDED BILL OF COMPLAINT.

Comes now the defendant, the Salmon River Canal Company, Limited, for answer herein and says:

1.

Admits the allegations contained in paragraphs one, two, three, four, five, six and seven of the amended bill herein, and admits that Exhibit "A" is a copy of the contract under the terms of which this defendant was organized.

2.

That shares of stock of this corporation amounting to about 73,000 shares representing water contracts for about 73,000 acres have been contracted for by various persons who made entry of land upon said Salmon tract mentioned in the amended bill herein; that this defendant is unable to say whether Exhibit "B" contains a list of all of the names of the holders of settlers' contracts or whether all of the persons named therein were or are holders of such settler's contract either as original entrymen or by assignment or conveyance, and therefore denies that said list is a true and correct list of the persons holding water contract or having an interest in this controversy.

3.

That this defendant has no interest in the matter in controversy herein other than as an operating company under the terms of the said contract, Exhibit "A," and said Settler's contract, Exhibit "C."

4.

Defendant denies that it has collected large sums of money from water-contract holders under the said irrigation system including the complainants osten-

sibly for the purpose of maintenance charges but that in reality such sums were used in payment of excessive or illegal salaries or expenses of the officers or the employees or attorneys of the defendant, the Twin Falls Salmon River Land and Water Company, and denies that it has collected such alleged maintenance charges from all water-contract holders upon said Salmon tract, although a portion only of the water contracted to be delivered was in fact delivered and defendant denies that it has levied any maintenance assessment or other charge improperly, or that the funds so collected have been improperly used or applied, or that they have been applied for the use or benefit of any other person or corporation.

5.

Defendant admits that it has been in the actual control and operation of the system of irrigation works described in the amended bill herein as set forth in the answer of the Twin Falls Salmon River Land and Water Company.

Defendant further alleges that it is in the actual control of the said irrigation system; that its officers are elected by its stockholders, and admits that a large portion of its stock is voted by the representatives of the Twin Falls Salmon River Land & Water Company as provided in the contracts, Exhibits "A" and "C;" that the length of time during which said company will vote said stock depends upon the speed with which payments are made, as is more fully shown in said contracts, and defendant denies that its officers are the agents of the Twin Falls Salmon

River Land & Water Company, and denies that the interests of the complainants or any of the, or of the settlers, or any of them, on the said Salmon tract, or the holders of water contracts thereon, are adverse to the interests of the Salmon River Canal Company, Limited, and defendant denies that the complainants are compelled to institute this action not only in their own behalf and for their own benefit but in behalf of and for the benefit of all of the settlers or water-contract holders on said tract, or for the benefit of this defendant, and defendant denies that by reason of the premises or otherwise that it would be useless to demand or ask the defendant, the Salmon River Canal Company, Limited, to institute or prosecute this action, but, on the contrary, this defendant avers and alleges that it is desirous of doing those things in all of the matters affecting its stockholders which the majority of its stockholders desire; that, as it is informed and believes, about one-third of its stockholders were desirous of adjusting such differences as they may have with the Twin Falls Salmon River Land & Water Company by means of arbitration; that about one-third of its stockholders were opposed to arbitration and that the remaining one-third thereof were non-committal with regard to whether or not there was any controversy to be settled or as to the manner in which it should be settled; that no request has ever been made of the Salmon River Canal Company, Limited, to bring any action whatever with regard to the matters in controversy herein.

6.

Denies that this defendant has refused or still refuses to supply complainants, or any of them, or other contract holders, or any of them, with water as contemplated by the contracts, Exhibits "A" and "C," or that this defendant fraudulently pretends that the water heretofore supplied is ample for the acreage entered or that this defendant has refused to deliver water in the quantities contemplated and as required by the contracts, Exhibits "A" and "B," and denies that water has been delivered to the settlers in a very much less amount or in any less amount than that provided in the said contracts, and defendant denies that unless the court appoints a receiver or receivers herein and takes possession of the said irrigation works and operates the same that a multiplicity of suits will result or that any acts of oppression will be committed or that any such acts have been committed by this defendant, and denies that this defendant has refused or still refuses to adopt a proper system of delivery of water or one required by the condition of the crops, or that it has refused or still refuses or that it will continue to refuse to recognize the rights of the complainants or any of them, or of the other settlers upon said tract, or any of them, or deny to them or any of them the right to receive the amount of water to which they are entitled under the said contracts; defendant denies that it has not delivered or that it will not deliver an ample supply of water during the periods of delivery or as the needs of the crops require; de-

nies that the results of its methods and system of delivery have been to cause hardship, annoyance or loss of crops; denies that to continue the same will produce great loss or damage or numerous claims for set-offs or reimbursements from the amounts due from settlers, and defendant further says that on account of the character of the soil and physical conditions existing upon said Salmon tract that it is absolutely necessary to use great care in the amount of water delivered and used for irrigation purposes thereon, and that if great care is not used, that a large amount of the lands upon said tract will become valueless and that adjoining lands now owned and settled upon by persons who are not contract holders on the Salmon River tract will be in danger of injury and that it is therefore necessary for this defendant in the delivery of water on the said Salmon River tract to adapt said delivery to the conditions of the soil, the general physical conditions upon said tract and to the climate and general condition surrounding the growing of crops on said project; that it would be impossible to deliver water to the water-contract holders upon said project in the manner and to the extent demanded by the complainants herein without great injury resulting to the lands upon said tract and the probable injury to lands upon adjoining tracts.

That, as heretofore stated, this defendant has no interest in the matter in controversy herein except such incidental interest as it may have as an operating company in charge of the irrigation works men-

tioned in the amended bill; that it is not a corporation organized for profit but only for the operation of said works; that as such corporation it is its duty to safeguard the water supply for said project and to see that injury does not occur to the lands on said Salmon tract or to the adjoining lands by reason of the use of the water supply in its charge. That it desires to pursue such course in any matters which are in controversy with the Twin Falls Salmon River Land & Water Company herein as may be required or desired by a majority of its stockholders; that it never has refused and does not intend to refuse to follow or carry out the wishes and desires of its stockholders.

Wherefore, Defendant prays that it may be hence dismissed and that it may have such relief herein as to the court may seem meet and equitable.

P. B. CARTER,

Solicitor for Defendant, Salmon River Canal Company, Ltd.

Duly verified. Endorsed: Filed March 29, 1915.
A. L. Richardson, Clerk. By Pearl E. Zanger,
Deputy.

(Title of Court and Cause.)

ANSWER OF COMMONWEALTH TRUST COMPANY OF PITTSBURGH, TRUSTEE.

Now Comes the Commonwealth Trust Company of Pittsburgh, Trustee, and saving and reserving to itself all manner of benefit or advantage of exception

that can or may be had or taken to the many errors, uncertainties and imperfections in the said amended bill contained, with like effect as if this defendant had demurred thereto, for answer to said amended bill or to such parts thereof as this defendant is advised it is necessary or material for it to make answer thereto, answering says:

I.

This defendant is not advised save by the allegations of said amended bill of complaint, and is without knowledge as to the citizenship or residence of any of the parties plaintiff to said suit, and it therefore leaves the complainants to make such proof thereof as they may be advised is material or as they may be able to produce, but this defendant admits that the said Twin Falls Salmon River Land & Water Company is a corporation organized under the laws of the State of Delaware and is a citizen of said State, and that the Salmon River Canal Company, Limited, is a corporation organized under the laws of the State of Idaho and is a citizen of said State; that the said John M. Haines, W. L. Gifford, Grace Sheperd, Joseph H. Peterson and Fred L. Huston are officials of the State of Idaho as alleged in paragraph IV of said amended bill of complaint and constitute the State Board of Land Commissioners of said State; that this defendant, the Commonwealth Trust Company of Pittsburgh, is a corporation organized under the laws of the State of Pennsylvania and a citizen of said State with its principal office in the City of Pittsburgh, and that the defendant

A. C. Robinson is a citizen and resident of said State of Pennsylvania residing in the City of Pittsburgh, said State.

II.

This defendant admits that on or about the 30th day of April, A. D. 1908, the defendant, Twin Falls Salmon River Land & Water Company, made and entered into a contract with the State of Idaho, the latter acting by and through its State Board of Land Commissioners; admits that said contract was entered into under the terms of the Act of Congress commonly known as the Carey Act, approved August 18th, 1894, and certain other acts of Congress amendatory thereof or supplemental thereto, and the laws of the State of Idaho accepting the terms of said acts of Congress, made in furtherance thereof and for the purpose of carrying out the terms, provisions and conditions of said Acts of Congress; admits that said contract contemplated and provided for the construction of an irrigation system consisting of a storage reservoir in Twin Falls County, said State, for conserving and storing the waters of the Salmon River and for the purpose of diverting and carrying said water so stored and conserved to the lands to be reclaimed therefrom; and this answering defendant is not fully advised as to the terms of said contract and is without knowledge whether the contents thereof are correctly stated in paragraph VI of the amended bill of complaint herein, and it, therefore, prays that complainants be required to make strict proof of the terms and provisions of said contract of April 30th, 1908.

III.

This defendant is without knowledge as to the facts alleged in paragraph VIII of said amended bill of complaint, and it therefore prays that the complainants be required to make strict proof of each and every allegation contained in said paragraph VIII of the said amended bill herein.

IV.

This defendant is not advised, save by the allegations of said amended bill, as to whether on or about the 1st day of June, 1908, the complainant A. E. Caldwell by himself or his predecessor in interest, made entry with the State Board of Land Commissioners for the lands described in paragraph IX of said amended bill, or as to whether said complainant or his predecessor in interest purchased water rights or entered into a contract or contracts as alleged in said paragraph IX, and this defendant, being without knowledge as to said facts, leaves the complainants to make such proof thereof as they may be advised is material and as they may be able to produce.

V.

This defendant is not advised, save by said amended bill of complaint, whether the said complainants or any of them or various other settlers on the tract of land in said amended bill referred to, made entries by themselves or their predecessors in interest for tracts of land under what is referred to as the Salmon River Segregation in said amended bill, or as to whether such entries are fully described in complainants' Exhibit "B," referred to in said amended

bill, and this defendant, being without knowledge as to the allegations contained in paragraph X of said amended bill, prays that complainants may be required to make strict proof of each and every of said allegations.

VI.

This answering defendant is not advised, save by said amended bill of complaint, whether the Twin Falls Salmon River Land & Water Company on or about the 1st day of June, 1908, or at any other time, sold to persons who held entries or owned land on said Salmon River Segregation, about seventy-five thousand shares or water rights in the irrigation works referred to in said amended bill, and being without knowledge as to the matters set forth in said paragraph XI in said amended bill, this answering defendant prays that complainants may be required to make strict proof of each and every allegation contained in said paragraph XI.

VII.

This defendant is not advised, save by said amended bill, as to what was understood or agreed or contemplated by the terms of the contract referred to in said amended bill as the State Contract, and being without knowledge as to said matters and each of the allegations contained in said paragraph XII of said amended bill, this defendant prays that complainants be required to make strict proof of each and every allegation contained in said paragraph XII; but this defendant, upon its information and belief, denies that under or by the terms or conditions of what is

referred to in said amended bill as the Settlers' Contracts, the owners of shares or water rights in said irrigation system are entitled to receive one-hundredth (1-100) of a cubic foot of water per acre per second of time for the irrigation of the lands described in their respective contracts, but on the contrary, this defendant alleges on its information and belief, that such water was to be delivered in turn or by rotation at such times and in such quantities as said Twin Falls Salmon River Land & Water Company or said Salmon River Canal Company, Limited, should deem necessary or proper.

VIII.

This defendant is not advised, save by said amended bill, as to the water supply of said irrigation system or as to the flow of said Salmon River, or as to any of the facts alleged or set forth in paragraph XIII of said amended bill, and being without knowledge as to the facts set forth in said paragraph XIII, it prays that complainants may be required to make strict proof of each and every of the allegations contained in said paragraph.

IX.

This defendant is not advised, save by said amended bill, as to whether the lands of complainants and others on said Salmon River tract are dry and arid in character and will not produce crops except by irrigation, and as to the amount of water that may be required per acre, and as to whether such water must be furnished in continuous flow or by periods of rotation, and as to any of the other facts set forth

in paragraph XIV of said amended bill, and being without knowledge as to such facts or any of them, prays that complainants be required to make strict proof of each and every allegation contained in said paragraph XIV.

X.

This defendant is not advised, save by said amended bill, whether it was provided for or contemplated by the State contract or what is referred to in said amended bill as the Settlers' Contracts, that an ample supply of water was and would be provided and actually furnished through said irrigation works as alleged in paragraph XV of said amended bill, and being without knowledge as to said allegations and as to any of the other allegations contained in said paragraph XV except as herein otherwise expressly admitted or denied, this defendant prays that complainants be required to make strict proof of each and every allegation contained in paragraph XV of said amended bill; but this defendant, upon its information and belief, denies that complainants or other settlers upon said tract, or any of them, are entitled to receive one-hundredth (1-100) of a cubic foot of water per acre per second of time for each water right or share purchased, either by continuous flow or during the irrigation season from April 1st to November 1st of each year, or an equal or proportionate amount if delivered by rotation or by periods of time.

XI.

This defendant is not advised, save by said amend-

ed bill, as to any of the facts set forth in paragraph XVI of said amended bill, and being without knowledge as to said facts or any of them, it prays that complainants be required to make strict proof of each and every allegation contained in said paragraph XVI.

XII.

This defendant is not advised, save by said amended bill, as to any of the facts set forth in paragraph XVII of said amended bill, and being without knowledge as to said facts or any of them, prays that complainants be required to make strict proof of each and every allegation or the facts set forth in said paragraph XVII.

XIII.

This defendant is not advised, save by said amended bill, as to any of the facts set forth or allegations contained in paragraphs XVIII, XIX, XX and XXI of said amended bill, and being without knowledge as to the facts contained in said paragraphs, and each and every of them, this defendant prays that complainants be required to make strict proof of the allegations contained in said paragraphs XVIII, XIX, XX and XXI.

XIV.

This defendant denies that under or by virtue of the terms and conditions of what is referred to in said amended bill of complaint as the State Contract or the Settlers' Contracts, or because of the failure of the defendant Twin Falls Salmon River Land & Water Company to comply with the terms or condi-

tions of said State Contract or the Settlers' Contracts the balance due from the complainants or other settlers on said tract or the purchasers of water rights was intended to be or to constitute a trust fund for the purpose of carrying out the terms or any of the terms or conditions of either the said State Contract of the said Settlers' Contracts, or any of them, or the purposes of the said Act known as the Carey Act, or to supply the entrymen or contract holders with an ample or sufficient supply or any supply of water in a substantial or other ditch; but, on the contrary, this defendant alleges that the amount due under said water contracts or settlers' contracts is due and payable to the owners or holders of said contracts. This defendant is not advised, save by said amended bill of complaint, as to the amount due under said Settlers' Contracts, and it, therefore, leaves complainants to make such proof thereof as they may be advised is material or as that may be able to produce.

XV.

This defendant is not advised, save by said amended bill, as to any of the facts set forth in paragraph XXIII of said amended bill, and being without knowledge as to said matters, this defendant therefore leaves the complainants to make such proof of the facts contained in said paragraph XXIII as they may be advised is material or as they may be able to produce.

XVI.

This defendant is not advised, save by said amend-

ed bill, as to whether said Twin Falls Salmon River Land & Water Company is insolvent or unable to respond in damages to complainants and other holders of contracts on said Salmon tract, and it, therefore, leaves complainants to make such proof thereof as they may be advised is material or as they may be able to produce. But defendant denies that unless the amount due from complainants and other holders be treated as a trust fund to carry out the terms and conditions of such State Contract and the said Settlers' Contracts, complainants, or any of them, or the other contract holders or any of them on said project will be without adequate remedy or will suffer great or irreparable loss or injury, or that said irrigation system will be a total failure or that patent will not issue from the United States to the State of Idaho or the persons entitled thereto for lands embraced in said segregation.

XVII.

This defendant is not advised, save by said amended bill, as to whether it is either necessary or feasible to secure an additional supply of water for the lands embraced in said segregation, and being without knowledge as to said facts, it prays that complainants be required to make strict proof thereof; but this defendant denies that said irrigation project can not be made a success unless the irrigable area in said tract be reduced to thirty thousand acres, or to any other area less than the amount for which water rights have been sold; denies that any of the lands under said segregation should be released or

declared without water right therein, and upon its information and belief, alleges that the Court is without authority, power or jurisdiction to cancel any of the contracts for the sale of water rights under said Salmon River project or to reduce the acreage entitled to water from said irrigation system.

XIX.

This defendant is not advised, save by said amended bill, as to the allegations contained in paragraphs XXVI and XXVII of said amended bill relative to the control of the Salmon River Canal Company, Limited, by the said Twin Falls Salmon River Land & Water Company, or as to any of the facts set forth in said paragraphs XXVI and XXVII, and being without knowledge as to said facts or any of them, it prays that complainants be required to make strict proof of each and every allegation contained in said paragraphs XXVI and XXVII.

XX.

The defendant is not advised, save by said amended bill, as to whether either the said Twin Falls Salmon River Land & Water Company or the said Salmon River Canal Company, Limited, have failed or refused to supply complainants or other contract holders under said irrigation system with water as contemplated by the State Contract or the Settlers' Contracts, or have failed to furnish or supply persons entitled to water from said irrigation system to the amount of water to which they may be entitled as alleged in paragraph XXVIII of said amended bill, and being without knowledge as to

such facts, it prays that the complainants be required to make strict proof of each and every of said allegations. And defendant, on its information and belief, denies that unless a receiver is appointed for said irrigation system and for operating the same, the said Twin Falls Salmon River Land & Water Company will oppress complainants or other settlers on said tract, or that its operations or conduct or management of said irrigation system will result in a multiplicity of suits or any suits; denies that either the said Twin Falls Salmon River Land & Water Company or the Twin Falls Canal Company, Limited, has refused or will refuse to adopt a reasonable or proper system of delivery or as required by the condition of the crops, or will refuse to recognize the rights of complainants and other settlers on said tract, or any of them, or will refuse to deliver water to complainants and other contract holders on said tract, at such times and in such manner and in such quantities as they may be entitled to receive the same under their respective contracts, and upon its information and belief this defendant further denies that complainants and other settlers or persons entitled to receive water from said irrigation system have not in the past received the water to which they were entitled or as the needs of their respective crops required the same, or that the methods or system of delivering water to complainants and other settlers on said tract has caused hardship, annoyance or loss of crops, and this defendant likewise denies, upon its information and belief, that a continuation of the

system or method of delivering water in the past will produce any loss or damage to the complainants or persons entitled to water from said system, or will result in numerous or other claims for off-sets or reimbursements from the amounts due from settlers under their respective contracts for the purchase of water rights; and denies that the amount due from settlers or purchasers of water rights constitutes a trust fund available for any purpose except for the payment of the bonds issued under the mortgage or trust deed under which this defendant is trustee or under other similar obligations providing for the pledge or deposit of such water contracts, or by mortgage or lien upon said irrigation system or on said water contracts, or both such irrigation system and water contracts; that as to whether the settlers upon said tract, or any of them, will refuse to pay the balance due on their water contracts unless such balance be held to constitute a trust fund for the purposes set forth in paragraph XXVIII of said amended bill, this defendant is not advised, save by said amended bill, and being without knowledge as to such matters, prays that complainants be required to make strict proof of said allegations and each of them.

XXI.

This defendant admits that some time after the 1st day of June, A. D. 1908, but as of said date, the said Twin Falls Salmon River Land & Water Company made, executed and delivered a certain mortgage or deed of trust conveying to the American

Trust and Savings Bank, a corporation organized under the laws of the State of Illinois, with its principal office in the City of Chicago, said State, as Trustee, the irrigation system, water rights and water appropriations described or referred to in plaintiffs' amended bill of complaint, including the reservoirs, dams, canals, ditches, laterals and other structures of every kind used in connection with or forming a part of said irrigation system, together with all rights of way, easements, privileges and franchises required for the proper operation and use of said irrigation system, and that as further and additional security for the payment of the bonds issued and to be issued under said mortgage or deed of trust there was assigned to and deposited with the said Trustee, The American Trust and Savings Bank, contracts sometimes referred to in said amended bill as Settlers' Contracts, to the aggregate amount par value, as this defendant is informed and believes, of \$2,337,319.92; and that, pursuant to the terms and provisions of said mortgage or deed of trust, the said American Trust and Savings Bank, Trustee, certified and delivered the negotiable coupon bonds of said Twin Falls Salmon River Land & Water Company to the amount of \$1,773,000.00, par value; that said bonds were issued upon the terms and conditions stated in said mortgage or deed of trust referred to in paragraph XXIX of said amended bill and only after there had been duly assigned to and deposited with the said Trustee water contracts or settlers' contracts to the amount afore-

said; that this defendant denies on its information and belief that said mortgage or deed of trust was made or executed or said bonds issued or delivered or said water contracts assigned to said Trustee before the construction of said irrigation works referred to in said amended bill, and this defendant prays leave to refer to said original mortgage or deed of trust when the same may be produced or to the record thereof referred to in said amended bill for a full and complete statement of the terms and conditions of said instrument and the terms and conditions upon which said water contracts or settlers' contracts were assigned to and deposited with said Trustee and said bonds issued, certified and delivered; and this defendant alleges that the bonds so issued, certified and delivered, as aforesaid, to the amount of \$1,773,000.00, par value, were negotiated and sold by said Twin Falls Salmon River Land & Water Company to divers and sundry persons who purchased the same for value without notice or knowledge of any offset or defense on the part of the makers of said water contracts or settlers' contracts against the payment of the amount due thereunder, and said bonds are still outstanding, as this defendant is informed and believes and so alleges the fact to be, and in the hands of innocent holders for value, who purchased the same relying upon the faith and credit of said water contracts and settlers' contracts so assigned to and deposited and pledged with the said Trustee as security for the payment of said bonds, and relying upon the fact that the

amount specified in said contracts, and each of them, as the purchase price of the water rights or shares of stock therein mentioned would be paid with interest thereon at the times and in the manner in said contracts stated, and relying upon the fact that said contracts were a first and prior lien upon the lands therein respectively described.

XXII.

This defendant admits that on or about the 8th day of October, A. D. 1914, the said American Trust and Savings Bank (now the Continental and Commercial Trust and Savings Bank), Trustee, resigned as Trustee under said mortgage or deed of trust and that this defendant thereafter and on or about the 9th day of October, A. D. 1914, succeeded to said trusteeship and is now the duly appointed, qualified and acting Trustee under said mortgage or deed of trust and holds the said water contracts or settlers' contracts under said mortgage or trust deed as security for the payment of the negotiable coupon bonds of said Twin Falls Salmon River Land & Water Company issued, sold, certified and delivered as aforesaid and held as aforesaid by innocent holders for value.

XXIII.

This defendant, according to its information and belief, denies that the said Twin Falls Salmon River Land & Water Company has failed, neglected or refused to comply with the terms or conditions; or any of them, of the said State contract or the said set-

tlers' contracts, or any of them; denies that by reason of any alleged or pretended default of said Twin Falls Salmon River Land & Water Company, the lien of said mortgage or trust deed is either impaired or subordinated or made subject or subordinate to the rights of purchasers of shares or water rights in said irrigation system, and denies that the grantee is said deed of trust took said deed of trust subject to the conditions, or any of the conditions, mentioned in paragraph XXXI, or any other paragraph or part of said amended bill; denies that the lien of said mortgage or trust deed is null or void or of no effect as against the said complainants or any other water contract holders in said irrigation system, or any other person, corporation or body politic.

XXIV.

This defendant is not advised, save by said amended bill, as to the allegations contained in paragraphs XXXII and XXXIII of said amended bill relative to an alleged assignment from said Twin Falls Salmon River Land & Water Company to the defendant, A. C. Robinson, of certain water contracts, and it, therefore, leaves complainants to make such proof of the allegations contained in said paragraphs XXXII and XXXIII as they may be advised is material or as they may be able to produce.

XXV.

This defendant is not advised, save by said amended bill, as to the facts alleged in paragraphs XXXIV and XXXV of said amended bill, and being without

knowledge as to the facts set forth in said paragraphs, it prays that complainants may be required to make strict proof of each and every allegation contained in said paragraphs XXXIV and XXXV.

XXVI.

Further answering complainants' amended bill, this defendant says that it is informed and believes, and therefore states the fact to be, that under the terms and provisions of the said water contracts or settlers' contracts and under the said State contract referred to in the amended bill herein, and under the Act of Congress commonly known as the Carey Act and the amendments thereto and the laws of the State of Idaho passed in furtherance of said Acts of Congress in order to obtain the benefit thereof, the said complainants and other purchasers of water rights in said irrigation system are only entitled to a proportionate interest in said irrigation system, water rights and water appropriations based upon the number of shares or interests finally sold therein.

XXVII.

As to each of the allegations of said amended bill not in this answer expressly admitted or denied, this defendant prays that the complainants may be required to make strict proof thereof and of each of such allegations of said amended bill as against this defendant.

Wherefore, having fully answered complainants' amended bill of complaint filed herein, this defendant

prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

COMMONWEALTH TRUST COMPANY OF
PITTSBURGH, TRUSTEE,

By RICHARDS & HAGA,
Its Solicitors.

Endorsed: Filed December 10, 1914. A. L.
Richardson, Clerk.

(Title of Court and Cause.)

ANSWER OF A. C. ROBINSON, ONE OF THE
ABOVE-NAMED DEFENDANTS, TO THE
AMENDED BILL OF COMPLAINT OF THE
ABOVE-NAMED COMPLAINANTS.

Now Comes A. C. Robinson, one of the above-named defendants, and saving and reserving to himself all manner of benefit or advantage of exception which can or may be had or taken to the many errors, uncertainties and imperfections in the said amended bill contained, with like effect as if this defendant had demurred thereto, for answer to said amended bill and to such parts thereof as this defendant is advised it is necessary or material for him to make answer to, answering says:

I.

This defendant has seen the copy of the answer proposed to be forthwith filed by the defendant Commonwealth Trust Company of Pittsburgh to complainants' amended bill herein, and he has no doubt that the statements contained in such answer are

correct, and he has little personal knowledge respecting the facts and allegations contained in said amended bill or the deeds, dealings and transactions therein referred to, and he therefore prays that the answer of his co-defendant, Commonwealth Trust Company of Pittsburgh, may be taken and considered as a part of this defendant's answer to said amended bill, with the same force and effect as if the statements therein contained were herein repeated or set forth at large. But, for greater certainty as to the contents of deeds and other written documents referred to in said amended bill, this defendant prays leave to refer to such deeds or documents when produced.

II.

This defendant admits that on or about the 14th day of October, 1914, the defendant Twin Falls Salmon River Land & Water Company assigned to this answering defendant certain water contracts or settlers' contracts aggregating about \$194,397.48, and that the assignment of such contracts was thereafter filed for record with the Recorder of Twin Falls County, Idaho, and recorded as alleged in paragraph XXXII of said amended bill; but this defendant denies that said assignment was without valuable consideration, but on the contrary defendant alleges the fact to be that such water contracts were assigned to this defendant as security for the payment of large sums of money loaned or advanced to said Twin Falls Salmon River Land & Water Company, and that such contracts are now held by this defendant as col-

lateral security for the sums so loaned or advanced to the said defendant Twin Falls Salmon River Land & Water Company, and such loans or advances were made and such assignments and water contracts or settlers' contracts received as security for the repayment of such loans or advances, without notice or knowledge of the pretended claims of said plaintiffs or any of them, or of the settlers or purchasers of water rights executing said contracts, and without notice or knowledge that any setoff, defense or counterclaim existed or would be made by way of defense, or otherwise, against the amount due and payable under said contracts according to the terms thereof; and this defendant is a holder for value of such water contracts without notice or knowledge of the pretended claims of plaintiffs as set forth in their amended bill herein.

Wherefore, having fully answered complainants' amended bill of complaint filed herein, this defendant prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

A. C. ROBINSON,
By RICHARDS & HAGA,
His Solicitors.

Endorsed: Filed Dec. 10, 1914. A. L. Richardson.

(Title of Court and Cause.)

STATEMENT OF EVIDENCE UNDER EQUITY
RULE 75.

BE IT REMEMBERED, That this cause came regularly on for trial before the Court sitting in

equity on April 1st, 1915, on the amended complaint of the plaintiffs and the issues made thereon by the answers of the Commonwealth Trust Company of Pittsburgh and A. C. Robinson and the amended answer and cross-bill of the Twin Falls Salmon River Land and Water Company and the Salmon River Canal Company. Whereupon the following proceedings took place:

Mr. Haga: We waive proof of the citizenship of the complainants and admit correctness of plaintiff's Exhibit "C" the Settlers' Contract and further that the complainants by themselves or predecessors in interest have made contracts with the Twin Falls Salmon River Land and Water Company in the form of Plaintiff's Exhibit "C"; that all the settlers' contracts so far as the printed form is concerned are the same.

Mr. Longley: May it please the Court, it is our understanding of the rules that to this cross-bill we will be required to file a reply.

Mr. Hays: That may be done at any time, and the Court can consider it done.

The Court: The time to reply or answer to the cross-bill, if an answer is required, will be extended for a reasonable length of time, after I have ruled upon the motion.

Mr. Longley: Very well, your Honor.

The Court: It is to be tried upon the first amended complaint, is it?

Mr. Longley: Yes, sir.

The Court: You may proceed with your evidence. There is an amended answer to this complaint?

Mr. Hays: There is an amended answer and cross-bill. They are all together.

Mr. Golden: If your Honor please, there are a number of issues raised by the answer of the trustees. It denies the citizenship of the complainants, and other things of that kind. I think perhaps Mr. Haga didn't mean to do that, and perhaps we may stipulate here to reduce the proof considerably.

Mr. Haga: We waive the proof of citizenship of complainant.

The Court: The Twin Falls Salmon River Land & Water Company, is that the construction company or the holding company?

Mr. Hays: It is the construction company. The Salmon River Canal Company, Limited, is the operating company.

Mr. Golden: Do we understand that it appears that you admit that all of these complainants, by themselves or their predecessors in interest, have made contracts with the Twin Falls Salmon River Land & Water Company similar in form and substance to Exhibit "C," being the settlers' contract, attached to the complaint?

Mr. Haga: Yes, we will admit that. We admit the citizenship, and we admit the correctness of the form of contract.

The Court: You say there is an answer of the trustee?

Mr. Haga: Yes, your Honor, answer of the trus-

tee, and I believe by Mr. Robinson, A. E. Robinson.

The Court: By trustee you mean the Commonwealth Company?

Mr. Haga: Yes, your honor.

Mr. Golden: And will counsel for defendants admit that all contract holders upon the Salmon tract holding contracts similar to the contract called Exhibit "C" are similarly situated with the complainants, to the extent that their contract and rights under the contract are alike and similar?

Mr. Hays: There is no objection to that, as I understand it.

Mr. Haga: I understand that all contracts made with the settlers are of the same kind, so far as the printed form is concerned. The description of the land and the ditches and the amount of payments may vary.

Mr. Golden: But that they are similarly situated with the complainants with reference to their right under the contracts, that is, the construction of the contract?

Mr. Longley: The particular terms and provisions of the contract?

Mr. Haga: If you have reference to matters outside of the contract, then we will not stipulate, but so far as the contracts are concerned, they read alike.

Mr. Golden: What I meant was this, that all settlers on the Salmon tract are in the same position with reference to their rights under the contract,

that is, as a matter of law, their rights are similar and alike.

Mr. Haga: I understand, Mr. Golden, that you may claim that some of your clients may have rights based upon representations that have been made upon the prospectus or circulars that have been issued, and, if so, upon behalf of the trustee I wouldn't stipulate that there is any right in any party outside of what is in the contract.

Mr. Golden: Only to the extent, Mr. Haga, that all contract holders are similarly situated as to their rights under the contract itself.

Mr. Haga: Isn't that covered by our stipulation that all contracts are alike?

Mr. Golden: I want it for the purpose, Mr. Haga, that there is a general allegation in our bill that all persons on the Salmon tract are similarly situated insofar as their contractual relations are concerned.

Mr. Longley: Eliminating everything except the plain terms and provisions of the printed contracts. That would eliminate any question of misrepresentations.

Mr. Haga: You eliminate from the matter all questions of representations or misrepresentations?

Mr. Longley: Yes. Under this stipulation, yes, insofar as others not parties to the record are concerned.

Mr. Haga: Yes.

Mr. Golden: That is agreed to then by counsel for the other defendant?

Mr. Hays: Yes. I will say here, Mr. Golden, that

perhaps the similarity of contract is not absolutely correct, although substantially so. All Carey Act contract holders have this form of contract. There is a slightly different form of contract for people having desert claims, and a slightly different form of contract for people having State land, Sections 16 and 36, but those differences seem to be unimportant, because the substance of the contract is the same, the contract only being made a little different to fit into the different characters of land.

Mr. Golden: Would it be agreeable to your Honor to take a recess now? Perhaps we can stipulate a great deal now, between now and afternoon, and save a great deal of time.

The Court: Very well, until 2 o'clock.

Mr. Golden: We understand, your Honor, that defendants will stipulate for the purpose of saving the time of the Court, and a number of other matters, that might require some time to take it up in the introduction of proof. It it, I understand, conceded that no patent had been issued for any of the Carey Act lands on the Salmon tract, under the Salmon River segregation. That is correct, Judge Hays?

Mr. Hays: I think so. I think it may also be admitted that none had been applied, may it not?

Mr. Longley: I am not advised as to that.

Mr. Hays: None has been applied for.

Mr. Golden: It is admitted, your Honor, by counsel for the defendants that the Twin Falls Salmon River Land and Water Company, on or about the 1st day of June, executed a trust deed to the American

Trust and Savings Bank, a corporation organized under the laws of the State of Illinois, trustee, on the trust deed, by which it incumbered all of its property and all the franchises that it had under this contract with the State of Idaho, and, as additional security for the payment of the indebtedness created by the first lien, it assigned water contracts similar to Exhibit "C" of the par value of \$2,337,319.22, and that under the terms of the trust deed the American Trust and Savings Bank, as trustee, has certified and delivered negotiable coupon bonds of said issue of the par value of \$1,773,000.00, and that all of those bonds are outstanding, unpaid, in the hands of bondholders. Am I right, Mr. Haga?

Mr. Haga: Yes.

Mr. Golden: And that the Twin Falls Salmon River Land & Water Company has defaulted in the payment of the interest upon those bonds, principal and interest?

Mr. Haga: There is no principal due, Mr. Golden.

Mr. Golden: But it has defaulted in the payment of interest?

Mr. Haga: For at least one interest period. I am not prepared to say how long, but at least one interest period. Mr. Golden, I don't want to admit that the mortgage was executed on the 1st day of June. As a matter of fact, it was executed some time after the 1st of June, but as of—the date of it is the 1st day of June, but it was executed after the contracts to which you have referred had been executed by the various purchasers of water rights, and at the time

that they were delivered to the trustee as security for the bonds.

Mr. Longley: Why not refer to the trust deed as bearing date the 1st day of June?

Mr. Haga: I want the record to show that it was not executed on that day. It was executed, I think, about two months after that time.

Mr. Golden: And that thereafter the American Trust & Savings Bank, original trustee, resigned, and the Commonwealth Trust Co. of Pittsburgh was substituted and appointed trustee in the place and stead of the American Trust & Savings Bank, and has accepted the trust, and now acting as trustee under this bond issue, under this trust deed, with residence at Pittsburgh, Penn.

Mr. Haga: The facts in relation to that are as set up in the answer of the Commonwealth Trust Co. to the amended bill of complainants in this case.

Mr. Golden: That in addition to the transfer of these water contracts to the trustee under the trust deed the Twin Falls Salmon River Land and Water Company has transferred and assigned to one A. C. Robinson, also a resident of Pennsylvania, water contracts similar to Exhibit "C" in this case, and that he now holds such water contracts.

The Court: Holds them as owner or as collateral only?

Mr. Golden: As collateral only for the payment of indebtedness, or for money advanced by Mr. Robinson, I believe you so state in your answer, do you, Mr. Haga, of A. C. Robinson?

Mr. Haga: Yes, our agreement as to the facts will be in accordance with the statements contained in the answer of A. C. Robinson. The facts are set forth in that answer, Mr. Golden, and we attest that the facts there pleaded are correct.

Mr. Golden: I understand that the Twin Falls Salmon River Land and Water Company stipulates and concedes that it has never delivered water to any of the contract holders on the contracts known as Exhibit "C" to the extent of 1-100 of a cubic foot of water per acre, per second of time, continuous flow, from the 1st day of April to the 1st day of November of each irrigation season. Is that correct, General?

Mr. Hays: That, I take it, Mr. Golden, covers the question of continuous flow from April 1st to November 1st of each year. I so understood it, and, that being the case, that would be a fact, as I understand it, that is, between those two dates, continuously.

Mr. Golden: Then will the defendants stipulate that the amounts due under these water contracts which have been assigned either to the trustee under the trust deed or to A. C. Robinson, are due and payable, and to be paid to the respective assignees, that is, the trustee under the trust deed, and A. C. Robinson, under this assignment?

Mr. Haga: If the Court please, we furnished them a copy of the trust deed under which these contracts have been pledged as security, and that should be sufficient evidence of the relative rights of the

trustee and of the Twin Falls Salmon River Land & Water Company.

Mr. Longley: Is our request inconsistent with the trust deed?

Mr. Haga: That trust deed is a lengthy instrument, and I am not prepared to say just what all the facts are. It is, of course, on the question that the contracts, so far as necessary, must first be applied to the payments of the bonds issued under that indenture. After that, the balance will go to the Twin Falls Salmon River Land & Water Company or its assigns.

Mr. Golden: Is that the qualification you want to make to the stipulation, Mr. Haga?

Mr. Haga: The statement I have made may be accepted, if you will accept it as a stipulation as to the manner in which the contracts are held.

Mr. Golden: But to the extent of the full payment of the indebtedness for which these contracts were assigned as security, that the amounts due under these contracts must be paid to the trustee in the trust deed, and the assignee, Mr. A. C. Robinson?

Mr. Haga: I think, Mr. Golden, you are asking us to stipulate to a lot of matters that we should not be asked to stipulate on. We are willing to furnish the trust deed, and I am not prepared to say what other assignments there may have been made of those contracts. I am prepared to say that those contracts were pledged with the Commonwealth Trust Company as security for the bonds and pleaded

as outstanding, that so far as they are pledged with that company they must first be applied to the payment of those bonds. Now, who is entitled to the proceeds then remaining, if there are any, I am not prepared to say.

Mr. Longley: Will you stipulate, Mr. Haga, that the payment you state must be made is to be made and shall be made to the trustee and the assignee, that is, that the money which will be collected here is paid to the trustee and assignee?

Mr. Haga: That the trustee is entitled to the proceeds under these water contracts until the full amount of the bonds has been paid.

Mr. Golden: At this time we offer in evidence, your Honor, Exhibit "A," being the contract between the State of Idaho and the Twin Falls Salmon River Land & Water Company, without the necessity of identifying it, and so on.

Mr. Haga: It is the Exhibit "A" attached to the amended bill.

Mr. Golden: It is filed with the amended bill, yes, Mr. Haga. I would like to have these marked as exhibits.

Mr. Golden: At this time, your Honor, we offer in evidence plaintiff's exhibits 13 to 16, inclusive, being the four contracts entered into between the Twin Falls Salmon River Land & Water Company for the defendants in the action, and Peter Matson, the predecessor in interest of A. E. Caldwell, one of the complainants in this cause, which is in substance and form the same as Exhibit "C," meaning

the settlers' contract. I take it that there is no objection. And I understand that counsel will concede that Peter Matson, the original entryman, has assigned these contracts to A. E. Caldwell, and that he now holds them.

Mr. Hays: No objection. That is correct.

Mr. Golden: At this time I would like to have counsel stipulate that the other complainants, W. F. Mikesell, V. E. Morgan, J. E. Pohlman, W. C. Pond, James W. Beauchamp, and Carl Washburn hold similar contracts with the defendant, issued about the same time.

Mr. Hays: That is correct.

E. B. DARLINGTON, being called and duly sworn as a witness on behalf of complainants, testified as follows:

"My name is E. B. Darlington. I am chief engineer and watermaster of the Salmon River Canal Company and have been engaged in that capacity for four years. Prior to that time and for the past six years I was assistant engineer on the Salmon River project, beginning in February, 1909. As chief engineer of the Salmon River Land and Water Co., it was my duty to look after matters of construction and operation, maintenance and repair work. I was employed on the project practically from the beginning of work on the canal system and have been employed continuously. I am still in the employ of the Land and Water Company as chief engineer and it is my understanding that I am so employed as superintendent of operation in charge of the work for the

canal company; and after beginning work for the canal company I continued up to the present time in the employ of the Land and Water Company.

"I have no records in my custody which would enable me to state the number of acres embraced in outstanding water contracts of the Salmon River Land and Water Co., but can approximately state that there are about 73,000 acres. The water for the irrigation of land embraced within the segregation form what is locally known as the 'Salmon River,' which river and its tributaries are the only available supply that I know of, but I have made no investigation to determine the availability or possibility of securing other water for the supplying of the segregation. I have in my possession records which will enable me to state the acreage settled up and in crop for the years 1912, 1913 and 1914. In 1912 the total acreage in crop was 16,310 acres; in 1913 there was a total crop of 23,403 acres; in 1914, a total of 30,064 acres.

"The water first began to run in our reservoir and be conserved there during the latter part of 1910, but it did not become available for diversion into the canal system until April, 1911. On the first of October, 1912, after the runoff for the year 1912 had been discontinued, there was an available storage of 43,550 acre feet. There was delivered about 29,350 acre feet of water for irrigation during the year 1912, measured at the Farmers' weir. On the first of October, 1913, at the close of the runoff for that year, there remained 27,110 acre feet in the

reservoir, and during that year there was delivered at the farmers' headgates 50,175 acre feet. On the first of October, 1914, at the close of the runoff there was an available supply of 16,500 acre feet in the reservoir. During that year there were delivered 73,933 acre feet to the farms. The amounts delivered for each of the years did not include domestic supply but was delivered simply for irrigation purposes. Water for domestic supply was not measured over the weirs. On the 27th of March, 1915, I saw the water gauge in the reservoir which showed about 16½ feet or 25,000 acre feet stored in the reservoir. On March 31, 1913, there was 50,600 acre feet stored in the reservoir, and about the last of March, 1912, there was about 8,377 acre feet in the reservoir. On March 31, 1914, there was stored in the reservoir 51,600 acre feet.

"I have supervision over the distribution of the water and my duties at the present time are practically the same as when I was solely employed by the Land and Water Co. The demand was made upon me for the delivery of water, the most general demand being for delivery of 2¾ acre feet for the season.

Q. Were those demands complied with by you?

A. In some cases.

Q. Were they refused or denied?

A. No, not on that ground.

Q. You say not on that ground?

A. Not on the ground of any specific amount.

Q. Upon what ground, if at all?

A. There was no limitation, as we understood it, governing that total amount to be delivered.

Q. In other words, you declined to recognize the right of the water contract holders to receive any specific amount?

A. Any specific total amount, yes.

Q. And declined to accede to the demands of the water users for the delivery of any specific amount, because of that fact?

A. Oftentimes water was refused, that is, the demands were refused where the demand was excessive.

Q. Were the demands of the water contract holders who requested or demanded the delivery of a specific amount acceded to by you or refused?

A. Perhaps neither one. They weren't refused. I never refused that amount of water, just because it was that amount of water.

Q. I didn't ask you why you refused. I asked you if you did refuse to deliver to these water contract holders any specific amount of water upon their demand at any time?

The Court: That is, any specific amount demanded by them.

A. For the season, yes.

Mr. Hays: Did I understand you to say for the season?

A. If that was a specific demand for the season, I would refuse to deliver it.

Mr. Longley:

Q. And that was during all of the years 1912, 1913 and 1914?

A. Yes.

Q. Those demands were made during each of the years mentioned?

A. I presume so.

“These demands for water were made during each of the years 1912, 1913 and 1914, but were not always in the form of a demand for $2\frac{3}{4}$ acre feet for the season. Demands have been made upon me for the delivery of a continuous flow of $\frac{1}{2}$ inch per acre from April 1st to November 1st, which demands have not been complied with in any case; irrespective of the amount of water stored in the reservoir, it is my custom to deliver water to all customers who have put themselves in good standing by paying their maintenance.

“I cannot make any estimate that I would rely upon as to the amount of water that will be available for distribution by the first day of May based upon the experience of past years, while I have been chief engineer or watermaster upon the Salmon. From the 1st day of April, 1914, to the 1st day of May, there was an increase of 30,000 acre feet in the reservoir; during the same period of time in 1913, there was an increase of 20,000 acre feet, making an average of 25,000 acre feet increase in the reservoir for the two years. That 25,000 acre feet is the fair runoff for the river during that period for each year. Assuming that there will be an additional 25,000 feet during the month of April, 1915, there will be approximately 50,000 acre feet on May 1st, 1915. The distribution of water begins usually in the first

week of May of each year. Assuming that the same number of acres are cultivated in 1915 as in 1914 and that there is a continuous flow of $\frac{1}{2}$ inch per acre, that amount will last for about 60 days. Assuming that there is 25,000 acre feet in the reservoir the first day of April, 1915, and that the runoff from the river will be the same as for the year 1914, there will be an available storage of 87,200 acre feet from April 1st to November 1, 1915; and upon the same assumption there would be an available storage of 81,200 acre feet from the first day of April to the first day of August, 1915. During the year 1912 there was distributed 1.8 acre feet per acre of land, and during the year 1913 there was distributed 2.14 acre feet per acre, and for 1914, 2.46 acre feet per acre. Assuming that 1.2 inch per acre continuous flow were delivered each month continuously for the entire segregation of 73,000 acres, there would be delivered about 730 acre feet per day, not allowing anything for transmission or reservoir losses. In 1912 the transmission loss was about 50%; in 1913, 33%; in 1914, 27.3%. The reservoir losses for 1912 were 64,181 acre feet; in 1913, 46,314 acre feet; in 1914, 38,032 acre feet. Assuming the entire tract to be under cultivation and taking into consideration the reservoir and transmission losses, the same as for last year, distributing the water at the rate of $\frac{1}{2}$ inch per acre for all the lands on which water contracts are outstanding, and assuming the same runoff from the river as during the year 1914, the available supply including May, June, July, August,

September and October, would last about 50 days. The water supply would last for about 30 days, or during the month of May, if those assumptions are made, if the runoff during June, July, August, September and October was not taken into consideration. Mr. Hall is president of the Canal Company. The Salmon River Land and Water Company hold a majority of the stock and have control of the Canal Company."

On cross-examination, Mr. Darlington testified as follows:

I am familiar with the records of the measurements made by the Geological Survey. The figures which I have given were based upon those taken under my direction and not upon figures of the Geological Survey. A continuous flow of $\frac{1}{2}$ inch per acre for 73,000 acres would be equivalent to 730 acre feet per day. I mean that a flow at the rate of $\frac{1}{2}$ inch per acre continuously for 73,000 acres is the equivalent of 730 acre feet per day, or half an inch per day. 36,500 inches would be the equivalent of 730 acre feet or half an inch per acre per day, continuous flow for 73,000 acres; 730 second feet equal 1460 acre feet per day; or approximately 1460 acre feet per day; I think possibly my computations made in haste may have been incorrect, some of them. With this change in my figuring the runoff as heretofore testified to by me would be reduced to about fifteen days or about 50%.

G. M. Hall being called first and duly sworn as a witness for complainant testified as follows:

“My name is G. M. Hall. I am general manager of the Twin Falls Salmon River Land & Water Company of Hollister and President of the Salmon River Canal Company, Limited, and have been so engaged since last August. The stock of the Canal Company is in the name of the contract holders, that is, those who made contracts with the Land and Water Company. Under the terms of the contracts the stock in the Canal Company is held with the contracts and is voted by the trustee, or the Land and Water Company. The trustee I refer to is the trustee named in the mortgage, which I presume is a trust from the Land and Water Company securing the bonds of the Land and Water Company. The stock of the Canal Company is assigned and held with the contracts. The voting power of these shares, under the contract, is in the Land and Water Company until a certain percentage of the contract price has been paid; and I voted, as General Manager of the Land and Water Company, on those shares. The shares in the Canal Company are assigned back to the land company and are held by the trustee for the bond holders. The trustee, insofar as I am advised, does not exercise any control or management over either the Land and Water Company or the Canal Company. The trustee I refer to is the Commonwealth Trust Company of Pittsburg. I am not a representative of that company, but am General Manager of the Twin Falls Salmon River Land & Water Company, selected for that position by the officers of the Land and Water Company and directors at Pitts-

burg, I presume, I do not know where. I do not know whether any formal transfer or order has been entered turning the system or the operation of the system from the Water Company over to the Canal Company." Whereupon Mr. Haga inquired of counsel by whom was the order entered to which he referred. Counsel for plaintiff stated, "The State Land Board." The witness further testified: "Insofar as I am advised the Land and Water Company is in control of the Canal Company, and entire irrigation system, in that a majority of the shares of the stock in the Canal Company is controlled by the Land and Water Company."

On cross-examination the witness testified as follows:

"I don't know which company has been in control of the system for the last year or two, as I have only known it since last summer, but since that time it has been in the hands of the Salmon River Canal Company and that company was in control of the system when I first became acquainted with it."

H. M. Sims, being called and duly sworn as a witness for complainant, testified as follows:

"My name is H. M. Sims. I am one of the complainants in this action, and reside at Hollister, Idaho. I am one of the contract holders with the Twin Falls Salmon River Land & Water Company and have been since early in the year 1912. I own 160 acres." Whereupon the following proceedings were had:

The Court: "Isn't it admitted this gentleman owns a contract? I thought you had a stipulation today."

Mr. Longley: "Yes, your Honor." Whereupon witness further testified:

"I have made one payment upon the entire 160 acres, made at the time of the contracts were taken out. Since then I believe three payments have been made on one 80 and only one payment on the other 80. I had discussions with Mr. Darlington and Mr. Hall with reference to the amount of water delivered under my contracts during the years I owned the land. The contract on the 80 has been fully paid up to date. I do not just recall what time is specified in the contracts. I cannot say whether they were paid up in 1914 because they were paid by a readjustment which I had with the company, which I believe was equivalent to three payments including the first payment. I have made demands upon the Land and Water Company for the delivery of the amount of water specified in the contract. I advised Mr. Darlington, the water master, and Mr. Hall, and J. S. Green, who claimed to be a representative of the bond holders, and also Maurice Aitkin, a claim agent of the company, as to the amount I had expected for my place. I demanded of the Land and Water Company or the Canal Company one one-hundredth (1-100) cubic foot of water per acre per second of time, provided for in the contracts, but this demand was not complied with. The water master of the Company told me that the contracts did not

specify that amount of water continuous flow. I have not tendered performances with reference to the payment of installments because of the opinion given me by different officials of the company that I did not purchase a water right, but had merely purchased a proportionate share in an irrigating system which was absolutely worthless to me without the water, so I refused to make payments. I am ready, willing and able to comply with my part of the contract relative to payments thereunder upon the conveyance of the amount of water specified in these contracts, and the delivery of that water as per the contract. I have cleared 150 acres of the 160 and have enclosed the entire place with a good fence. I have a little house and concrete barns and ditch system, and a contour map and an engineering survey to determine the most efficient ditch system for my farm, and other out-buildings such as a granary and implement shed and the like, which, with the payments that I have made I would value at about \$8,000.00 for the 140 acres, because I have sold 20 acres during the last few weeks. I have farmed part of this land for two years, but have not had it farmed any other time. I did not receive from the Land and Water Company or the Canal Company one one-hundredth (1-100) of a cubic foot of water per acre per second of time for the land embraced in these water contracts during the irrigation season of each year while I held these water contracts. I have been advised at different times that I could not have more water when I asked for it. That is the extent

of any advice I ever received from the company relative to water deliveries. I was never asked by the Land and Water Company or the Canal Company or any one in their behalf to participate in any of the rules or the adoption of rules for the delivery of water to me, or the method or manner or the amount of water to be delivered to me with possibly the one exception. Mr. Hall spoke to me about ten days ago, that at a meeting of the directors of the company settlers would be given an opportunity to discuss the method of delivering water this season. No such method was employed by the company prior to this occasion."

Witness examined plaintiff's exhibit No. 17, which is in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT NO. 17.

"IDAHO, THE LAND OF OPPORTUNITY."

TWIN FALLS — SALMON RIVER
IRRIGATION PROJECT.

80,000 Acres of Carey Act Lands were opened for entry under the canal system on June 1, 1908. 70,000 acres of this land were filed on during the month of June.

SEVERAL THOUSAND ACRES OF CHOICE
LAND ARE STILL OPEN FOR
THE HOMESEAKER.

This tract of land affords better inducements to the homeseeker than any other tract of land in the northwest. Water supply of the best and in abundance. Climate, soil and topography of the country unex-

celled. These lands are divided from the famous Twin Falls tract only by the canal of the Twin Falls Company, and lie but four and one-half miles south from the Magic City of Twin Falls.

HOW LANDS AND WATER RIGHTS ARE SECURED.

Under the provisions of the Carey Act, each of the semi-arid States are granted 1,000,000 acres of land, provided that the State will procure private capital to reclaim the land. This is done and the State Land Board supervises the entire construction of the irrigation system and dams. The Land Board advises and looks after the interests of the settlers.

The entire canal systems and dams ultimately become the property of the settlers.

Any citizen over the age of 21 (except married women) can file on Carey Act lands, not exceeding 160 acres. Your Carey Act right is good even though you have used all your other government land rights.

The Carey Act is the most liberal and beneficial of any government act for the acquirement of land.

FINAL PROOF.

When an entry is made the entryman may, if he so desires, begin clearing his land, and if he has one-eighth of it in cultivation, seeded and ready for irrigation when the water is ready for delivery, he can at once publish his notice of intention to make final proof. This notice must be published five weeks, during all of which time he must reside on his land

with his wife, if married. After final proof, residence on the land is no longer required to hold title. The law requires that the entryman must establish a residence on the land within six months after water is available and maintain such residence until final proof is made. Final proof may be made at any time after reclaiming one-eighth of the land and within three years.

The Carey Act permits one person to file upon land for another so that by giving a power of attorney you may secure land without first going upon it. We furnish power of attorney blanks free on application. Clearing, planting and irrigation may be arranged by contract.

PAYMENTS.

The price of the water right and land on the Salmon Project is fixed by the State Land Board at \$40 for the water right and 50 cents per acre for the land.

The first payment of \$3 on the water right and 25c on the land is made at the time of filing.

The payments on the water right are as follows:

At time of filing, \$3.00 per acre.

April 1, 1911, \$2.00 per acre.

April 1, 1912, \$2.00 per acre.

April 1, 1913, \$2.00 per acre.

April 1, 1914, \$2.00 per acre.

April 1, 1915, \$2.00 per acre.

April 1, 1916, \$4.00 per acre.

April 1, 1917, \$4.00 per acre.

April 1, 1918, \$4.00 per acre.

April 1, 1919, \$5.00 per acre.

April 1, 1920, \$5.00 per acre.

April 1, 1921, \$5.00 per acre.

Interest at 6 per cent. per annum begins on the deferred payments on April 1, 1910, at which time water will be ready for delivery to the settlers.

Payments in full on water right do not have to be made at time of proving up. You still have the full time to make payments after final proof.

Table showing the amount of payments required at time of filing on each legal subdivision of 40, 80, 120 or 160 acres:

40 acres, payment required.....	\$131.50
80 acres, payment required.....	262.50
120 acres, payment required.....	393.50
160 acres, payment required.....	524.50

THE PRODUCTS.

Fortunately for the Salmon project, the productiveness and fertility of the soil has been demonstrated by the Twin Falls South Side tract, of which it is really a portion. Within a few feet of the Salmon lands adjoining the high line canal of the Twin Falls system for a stretch of more than 20 miles are cultivated farms which show for themselves. On these farms three cuttings of alfalfa are obtained each year and yields of 10 tons to the acre are common. Farmers living within a stone's throw of the Salmon tract have cleared from \$30 to \$50 per acre on a single crop of clover seed. Potatoes of the highest

quality yield abundantly, the highest yield reported being in excess of 500 bushels to the acre, obtained by A. P. Senior and Fred Ramsey of Twin Falls. Grains of all kinds produce wonderfully. In competition for the prize offered for the best yield of wheat and oats in fields of not less than 10 acres, virgin soil produced 74 bushels of Bluestem wheat and 116 bushels of oats to the acre. These fields were measured by engineers and in each instance the figures were substantiated by the affidavits of four witnesses. Vegetables of all kinds are grown in abundance and unsurpassed in quality.

On Rock Creek, which touches the northeastern boundary of the Salmon project, and where the conditions are identical, peaches, apples, prunes, pears and plums have been grown successfully for 28 years. During that period peaches failed but four times. Nine successive crops have been grown without a failure. The varieties of apples grown include Jonathans, Rome Beauties, Winesaps, Northwest Greenings, Northern Spies, Golden Russet, Yellow Transparent, Arkansas Black, and other well-known varieties.

TOPOGRAPHY.

This vast area is peculiarly favored for irrigation. It slopes gently to the northwest and has perfect drainage, thus insuring no sour soil or impure water, which proves injurious to crops.

CLIMATE.

The climate is considered ideal. Nights are cool and every day pleasant. There are some hot days,

but owing to absence of moisture in the atmosphere the heat is not oppressive. No cyclones, sudden changes, withering hot winds or sultry weather. Winters very mild, and seldom is there snow enough for sleighing.

WATER SUPPLY.

The water supply for the Twin Falls Salmon River project is obtained from the Salmon river, which has a vast drainage area in the Cassia national forest reserve. The water right is perfect and there is no land susceptible of irrigation above the Salmon tract and no water rights in contest. It carries water sufficient for the irrigation of more than 150,000 acres, in normal years, and as a rule the spring runoff is far greater than the amount of water required for the irrigation of this amount of land for the full season.

NATURAL ADVANTAGES.

The Salmon tract borders on the Cassia national forest reserve, where settlers can secure range and free fuel, and this in itself is a great item. There are numerous springs along the east boundary of the segregation of both hot and cold water. Wells have been obtained at from 20 to 100 feet on some portions of the tract.

MARKETS.

There is a large home demand for all products, and stockmen and the mining camps of Idaho and Montana are also consumers of the produce of the farms. Representatives of 16 commission houses were in Twin Falls at one time last season purchas-

ing wheat, oats, barley and other grains, and many carloads of the finest potatoes were bought and shipped. We are less than 600 miles from Portland, one of the largest grain shipping ports in the world, and with the completion of the proposed Idaho-Nevada Southern railroad, now surveyed through the tract, we will be nearer San Francisco than the agricultural districts of the great state of Utah. The Salmon tract is far nearer to the desert mining camps of Nevada than any other district.

NOT AN EXPERIMENT; THE PROOF IS HERE.

Two hundred and forty thousand acres under the Twin Falls Canal system, south of the Snake river, have been under water for two years; the phenomenal crop yield clearly demonstrating the richness and productiveness of the soil.

HERE ARE A FEW PRIZE CROPS:

84½ bushels of wheat per acre.

119 bushels of oats per acre.

94 bushels of corn per acre.

524 bushels of potatoes per acre.

22 tons of sugar beets per acre.

9 tons of alfalfa per acre.

OPPORTUNITY.

The Twin Falls-Salmon tract adjoins these lands and comes within 4½ miles of the magic city of Twin Falls. Same soil, same climate, same electric power, and equal advantages throughout.

The demand for irrigated farms, with reliable water rights, is so great, and the desirable sections

capable of irrigation are being settled up so rapidly, that it is only a question of a few years until irrigated lands will bring fabulous prices and the opportunity will be past to secure lands at \$40.50 per acre or many times that amount.

IRRIGATION.

Irrigation makes the farmer independent of rainfall, multiplies the productive capacity of the soil and creates wealth from the sunshine, water and land. This is why the farmer of the East is disposing of his farm there and coming to Twin Falls and securing lands under this great canal system that gives assurance of abundant and certain crops.

TRANSPORTATION.

Make application for rates to Twin Falls to D. E. Burley, general passenger agent, O. S. L. Ry., Salt Lake, Utah; E. L. Lomax, general passenger agent, U. P. Ry., Omaha, Neb.; C. A. Cairns, general passenger agent, C. & N. W. Ry., Chicago, Ill.

FREE TEAMS.

Free teams with competent drivers who are familiar with the lands are furnished land seekers to aid them in selecting their land.

INVESTIGATE.

The company desire that prospective settlers make a personal investigation of the lands, terms and all other conditions before making an entry. We employ no agents and pay no commissions. Home-seekers are their own agents. Careful investigation and inquiry by the settler is the wish of the company.

HOLLISTER.

Hollister is the name given to the new town to be built about the middle of the Twin Falls-Salmon River tract.

The power plant at the Great Shoshone falls will furnish power and light for the new city.

Artesian water can be supplied for domestic use.

The proposed Idaho-Nevada Southern Railroad will connect Hollister with Twin Falls and with Wells, Nevada, the junction of the Southern Pacific and Western Pacific railroads. Electric roads are also proposed that will enter Hollister.

Hollister will be the CITY of the Twin Falls-Salmon tract.

Investment in lots at Hollister are sure and safe. Hollister will be the distributing point for the entire tract.

To those looking for a place to engage in business there is no other point that offers better inducements and a brighter future than does Hollister. With the advent of water this town will forge to the front as has the magic city of Twin Falls.

Hollister has the location and all the natural advantages to make a city.

TWIN FALLS - SALMON RIVER LAND &
WATER CO.

W. S. Kuhn, President.

For further information, address

TWIN FALLS INVESTMENT CO., LTD.,

TWIN FALLS, IDAHO.

Sole agents for sale of water rights and town lots.

No agents employed or commissions paid.
C. B. Hurtt, Pres. I. B. Perrine, Vice-Pres. and
Gen. Mgr. H. L. Hollister, Vice-Pres. R. M. Mc-
Collum, Ass't Gen. Mgr. R. H. Cost, Sec'y.
G. F. Sprague, Treas.

and further testified:

"I have seen pamphlets in the same form, containing the same matter, printed evidently at the same time these were, with the same company. I saw these pamphlets prior to the time I took assignments to the contracts which were issued by the Land and Water Company and read them before I purchased assignments. I relied upon the statement contained in the circulars issued by the company to the effect that the State of Idaho guaranteed to protect the settlers in these matters and also, in a general way, upon the amount of land that was to be reclaimed, and upon the sufficiency of the water right.

"I have known Mr. S. H. Hays, or General Hays, and known that he has been the attorney for the Twin Falls Salmon River Land & Water Company for years, and have never heard General Hays make a statement with reference to the position the Land and Water Company took as to what was purchased under these contracts. I am familiar with the water deliveries down on the Salmon tract since I have been there, and have been over the tract more or less and am familiar with the deliveries of water to the farmers on the tract as to volume, or quantity, or regularity or water. In 1912 the deliveries were very irregular with regard to time and were by a system of

so-called rotation, that is, rotated in the ditches rather than amongst the farmers; by that I mean that the water would be in the canals for a period of ten days or two weeks and then not in the canals during a similar period. There was no depending upon the times when the water would be in the canals or not in the canals. A similar system was practiced during 1913, but during 1914 the water was in the canals and available to the farmers during a much larger period than during the other two years. The water was not delivered in a greater head than was as they called a head—the Canal Company called a head of water a half inch of water, that is, 1-100 of a second foot per second of time, during the summer of 1914, they delivered what they called a head and a half of water, which, to the forty acres, was equivalent to thirty inches, but they did not deliver this during a sufficient time to make the total amount delivered equivalent to what would have been had they delivered it during the entire irrigation season at the rate of 1-100, or 20 inches to the forty. In 1914 the water was turned on when the crop was requiring it. There was practically a continuous run of water from the time it was first turned on in 1914, with two or three interruptions, said to have been made for repairs, until in August during the very hot weather, when the water was turned off for ten days. The flow discontinued shortly after the first of August and was off ten or twelve days, I believe, and was finally discontinued for the year about the 5th or 6th of September. No deliveries were made

after that time except for domestic purposes. Steps were taken by the settlers on the tract during 1912, 1913 and 1914 to compel the company to deliver water under the contracts. I am familiar with the suits brought in 1913 and 1914 by Mr. Caldwell and also by other parties who were contract holders and settlers on the tract to compel the delivery of sufficient water."

On cross-examination Mr. Sims testified as follows:

"I am the owner and publisher of the 'Hollister Herald,' which paper I took over about the 1st of October, 1913. I was a subscriber to it before that time. It was the custom to print in that paper articles about the time of water deliveries, when the run would commence and so on. I did not take charge in 1913, in that it was too late for that purpose. K. H. Dixon was in charge before that time. In 1914 I do not believe there was a schedule of water deliveries printed while I had charge. In 1912-13 I was there on the tract on my farm and was not then in the newspaper business. It was the general plan to have the water run during those years for 20 days on then 10 days off, then 20 days on and then 10 days off and so forth, but that was not a practice. I do not know when the water was turned on in 1913, and do not know how long it ran after it was turned on. I have a record, but not with me, as to the time it was on and off in the main canal in 1913, but cannot give the times. I am a director of the Water Users Association, and have been Secretary since

March, 1913, and have taken a very active interest in the Association since that time. I acquired my interest in the contracts by assignment from the original entrymen who had not made any improvements on the land. The land was in a sagebrush condition when I acquired it. I proved up on the land myself and made final proof to the State in July, 1913. I got a crop on the land by that time and was living on it. That proof was accepted by the State and final certificate issued to me. I purchased the assignment before I came to the tract, at which time I was in the northern part of Idaho. I had been in that part of the country and in Washington a little over a year, I believe. I bought the land without seeing it and went on it about two weeks after the purchase, and have been on the land and in that vicinity ever since. There was a controversy in the summer of 1911 relative to the distribution of waters at that time. At the time I bought this land, in 1912, I did not know whether there was a Settlers' Association or not and did not know that there was a controversy, because I did not go on the tract to see what I was purchasing. I first examined the prospectus, plaintiff's exhibit No. 17, in the fall of 1912, but had received some of these circulars through the mail from my father, who was then in Grangeville, Idaho, and he was instrumental in getting me interested in the Salmon River tract. I am positive that before I purchased he sent me circulars and descriptive matter relative to the tract. I am unable to say when I first saw plaintiff's exhibit No. 17 except that it was before

I purchased the assignments. I did not see these except before the fall of 1912, but before I purchased the assignments to my land, which, I believe, was in January or February, 1913. I beg your pardon. I was mixed in my dates. It was 1912 and not 1913 when I first became financially interested in the land. It was then the fall of 1911 when I obtained the circular matter relative to the tract. I first received a circular, the one like plaintiff's exhibit No. 17, from my father before I became financially interested in this land, but did not supply counsel with it. I have other circulars, but do not happen to have them in my pocket. I don't know whether I received them before I became interested in the land. I made an effort to acquire copies of all the circulars used, for my own information and for the use of the Secretary of the Water Users Association, but not for the purpose of this trial. I have made no active effort as Secretary to acquire circulars used by the company or sent out by any one, whether colonization agent or others in connection with this project, but entrymen corresponding with me have forwarded copies to me. I have never written for them, but did advertise for a certain statement at one time that I wanted to obtain, but did not get it. Plaintiff's exhibit No. 17 is not the circular I advertised for. Mr. Hall told me about a meeting of the directors about ten days ago for the purpose of discussing the methods of water deliveries for 1915. I do not recall receiving a personal invitation, but I understood him to say that I would be welcome to attend and also understood

that all water users would be welcome to attend. I did not attend. I am not farming my land myself, but it is rented and was rented last year on a share basis, but it was not rented the year before. I farmed it myself in 1913."

Q. You stated, Mr. Sims, that you were ready, able and willing to pay the full amount of your contract if the Company would deliver to you a water right or an interest sufficient to give you one-half miners' inch continuous flow per acre. Do you mean by that that you have the funds available at this time so that the payment could be made if that interest was tendered to you?

A. I don't mean that I have kept the money in the bank waiting to pay it at any time, but I can arrange promptly to pay it, and have been able at all times to have made these payments.

On re-direct examination, Mr. Sims testified as follows:

I made final proof on the whole 160 acres in July, 1913; subsequent to making final proof, Mr. Darlington and Mr. Hall told me that the company did not sell a permit or water right or agree to deliver one one-hundredth (1-100) of a cubic foot of water per acre per second of time under the contracts. I made personal proof in order to comply with the law and to get final certificate to my land.

Whereupon the following proceedings took place:

Q. And what induced you to make this final proof, upon what theory did you make it?

Mr. Haga: Oh, your Honor, we object to it as certainly irrelevant and immaterial.

The Court: I don't quite understand the purpose of this, anyway. The whole matter of going into final proof I don't understand the purpose of. Perhaps there is something in connection with the final proof which makes it material.

Mr. Longley: If the Court please, the statute seems to provide that at the time of making final proof the entryman must show by satisfactory testimony or evidence the ownership of a water right sufficient to reclaim all of the land entered upon. Now, we don't think it is material, either, but having been gone into on cross-examination, we don't want to be met by the proposition later on that at the time of making this proof the witness believed that he had such water right, without having an opportunity to explain why he believed he had such water right.

The Court: He may answer that.

The witness further testified:

Why, I made the proof to comply with the law, to get final certificate to my land. There was no special consideration that moved me to make the proof at that particular time.

The following proceedings then took place:

Q. At that time, what was the understanding under these contracts as to whether you had a permanent water right or not?

Mr. Haga: If the Court please, the question of permanent right does not enter into this at all. There

is no question but what the right they have is a permanent right. There is no such contention.

The Court: Gentlemen, I don't think I will let this proof go in in this form. If the final proof was referred to for the reason suggested by Mr. Longley, you will have to produce the statements which were made at that time and let the witness see them and ask him about them, et cetera. This will simply open the door to all sorts of inferences, which wouldn't be quite clear to the Court, to require me to pass upon matters of that kind. I think I will strike out the testimony in regard to the final proof.

Mr. Golden: Both on cross and direct?

The Court: Yes.

Mr. Golden: Very well, your Honor. That is all.

The Court: With leave to confront the witness, if you desire, with the statements that he made at the time, if they are inconsistent.

Mr. Haga: If the Court please, the question was asked on direct examination if he had made final proof, and he stated he did, and when he made it.

The Court: What would be the purpose or materiality of it?

Mr. Haga: It might have a bearing in different ways, your Honor.

The Court: What is the bearing?

Mr. Haga: In the first place, if we desire to produce the proof later and inquire about it—

The Court: What I want to know now is as to what you are asking the question for.

Mr. Haga: First, I want to know if he had made

final proof, so that I may take steps to get the final proof for that purpose.

The Court: If that is the only purpose, it may stand for that purpose and no other. It will be understood, gentlemen, that this was merely a preliminary question for the purpose of giving information to counsel.

On re-cross examination, Mr. Sims testified as follows:

I do not know what was the date of the issuance of the Circular No. 17, and I do not know when the person from whom I acquired my land made his entry nor whether it was on the opening day in June, 1908, or not. I acquired 80 acres from my father. I purchased an assignment for the other 80 from a man in the east whose name I think was Everetts. My father was an original entryman, but I do not know the day upon which he made his entry, and do not know whether he had ever seen the circular, No. 17, before he entered or not, neither do I know the day of the entry of the other 80 acres. I do not know whether the person from whom I purchased the other 80 acres has ever seen the circular, No. 17, or not. I had seen the circular No. 17 before I purchased the land from my father, but I know that I had never seen that particular copy before, or presume I had never, but had seen a similar form to that, that is, one from the same issue containing exactly the same matter and having exactly the same shape. I first saw this circular prior to the time I took the assignment to my land, which was in January or February, 1912."

A. E. CALDWELL, being called and first duly sworn as a witness for the complainants, testified as follows:

"My name is A. E. Caldwell. I am one of the parties plaintiff in this action and reside near Hollister, having worked my place for more than four years, which place contains 160 acres on the Salmon, where I now live. I secured this land in the fall of 1909 by purchase and went upon the land first in the fall of 1910, having improved it by clearing off the brush, moving off some of the rock, leveling, ditching and fencing part of it. I have some small buildings there—a stable, shack, granary, chicken house sheds, stock sheds, and the like. I do not know the approximate value of the improvements. I first cropped part of the land in 1911, about 85 acres. In 1912 I had 125 acres in crop; about the same in 1913. The reason I did not cultivate more is that about 29 acres and a fraction of highland are above the ditch and cannot be irrigated by the gravity system.

"I had talks with Mr. Darlington, an official of the Land and Water Company, relative to a water right at different times, but cannot state in what year. He told me that I had only a proportionate water right and not a water right as I considered I had in my contract. I have farmed my land myself and have continuously occupied the land since the fall of 1910, and all work has been done under my supervision. During 1912, the flow of the water was not steady nor continuous, and the irregularity at my place was very unsatisfactory. By regularity, I

mean that at the end of the ditch or lateral sometimes the water is entirely gone and at other times I have a fair lot of water. That condition would apply to the four years. I have never been consulted regarding the time or the manner of water deliveries upon that tract. As a contractor, I have asked for water, and sometimes I got it and sometimes I didn't, and I have never participated nor taken part in the determination of when water should be delivered to the irrigation system and have never been called upon to so participate that I remember. During the years of 1911 to 1914, the water received varied a great deal at my place, and I have never received $\frac{1}{2}$ inch per acre continuous flow for the entire season, nor the equivalent during the irrigation season. That condition is true as to all the years 1911 to 1914, inclusive."

On cross-examination, A. E. Caldwell testified as follows:

"I was not an original entryman, but purchased from Peter Madsen, and was familiar with the general method of delivery on the tract in 1912 and 1913, being there all the time. I do not know that I understood the general plan to be twenty on and ten days off, but it was that way part of the time, but I do not know that it was that way all of the time. I remember something about one year as to such being the plan, but can't say as to the year. I took my assignment of the land in 1909 and was in Twin Falls when I bought the land, but was not living there, my home being at Quincy, Ill. I saw

the land before I bought it. I met Peter Madsen in Twin Falls, where he was living at the time, before I made the purchase, which was made through an agent. I did not buy from the Twin Falls Salmon River Land and Water Co. I am president of the Water Users Association."

W. F. MIKESELL, being called and first duly sworn as a witness on behalf of complainants, testified as follows:

"My name is W. F. Mikesell. I reside near Twin Falls, Twin Falls county, and am a farmer, having been so engaged for four years, and am living upon the Salmon, operating a farm containing 160 acres under the Carey Act. I first went upon the land to reside permanently in April, 1911, and began to improve the land right away, but had done some clearing in the fall of 1910. I have cleared the whole 160 and have it all fenced and fairly well cross-fenced and have a small house and two other shacks that I have been using for hired men. I have a granary 12x64; I have a barn, a machine shed 14x135, and hog sheds and such things. I have been on the land continuously since 1911, and the farm work has been under my personal supervision. I think I am familiar with the water deliveries as made by the Land and Water Company, such deliveries having been irregular and insufficient, especially the first year—I say especially the first year. As for the remaining years, it has been insufficient; at no time has $\frac{1}{2}$ inch per acre continuous flow been delivered to me for the entire irrigation season from the first of April

to the first of November, nor the equivalent of such an amount. I have had all my land on the Salmon under cultivation during the various years I have been there.

"I have had a talk a number of times with Mr. Hall relative to the water right purchased by me under my water contract, but cannot say that I have talked to any other agent of the Land and Water Company, but may have talked to Mr. Darlington. I was not present at a meeting held several years ago in Hollister at which General Hays presided or at least attended. Mr. Hall and I have talked relative to this water right on most every point we could think of, and Mr. Hall and I don't agree. As I gather from his conversation, he doesn't think there is any specified amount or that we bought a specified amount in the contract, neither does he think that it requires as much water as I think it does. We talked of every phase of it, I guess. I don't think I discussed the question with Mr. Hall as to whether I purchased water under the contract or only a proportionate interest in the irrigation system, and don't know whether I discussed it with any other officer or agent of the Land and Water Company, but did discuss it with an attorney who had some connection with the Water Company. I don't know as he would be called an agent, however. In any event, I do not know of his agency but do know, however, that he has some connection or has done some work for the Company. I placed approximately \$10,000 worth of improvements on my land."

On cross-examination W. F. Mikesell testified as follows:

"I cleared and plowed most of my land in 1911 but put in no crop. In 1912 I had 160 acres in crop and had some other land leased and all of it in crop in 1913, and also in 1914."

On being asked when he first got his water in 1914, he testified:

"I think the first water I used, there was a run in the first part of May, I think, for the grasses; somewhere between the 15th of May and first of June, somewhere around there, I don't know exactly."

"In 1911 I had some beans and potatoes, but had mostly grain—100 acres of wheat, 25 acres of beans and 5 acres of potatoes, and the rest was in pasture. I did not use water the first time it was run because it was only for grasses and I had not sewed my pasture at that time. Because of different springs we have, I cannot say as to what time I ordinarily began irrigation of grain on my tract, but in 1914 it was between the 15th of May and the 1st of June. The 15th of May was all right although it was quite dry, still it would have been all right. The first water I used in 1914 was around the first of June. People desire usually to irrigate their grass lands before they do their grain, and that is the reason I used the expression 'grass run,' and that run was made for the purpose of irrigating grass. We were given the understanding that it was only to be used for alfalfa and clover, and it was a very small run, too. As a

matter of fact, people desire to irrigate their alfalfa and grass first and irrigate it earlier than they do their grain. I began the irrigation of my grain about the first of June just as soon as the water came on, but do not recall the exact date; and in 1914 we had practically a continuous run. I started in irrigating my 100 acres of grain but had about 240 acres of crop, having an additional eighty leased, and had three irrigators at work, including myself. I had one irrigator on the 160-acre tract continuously, and I was there the greater part of the time, and had one more on the eighty, but there were practically two men continuously on the 160-acre tract, but the one man on the 160 had no help excepting myself. It took us about 25 days to get over the hundred acres of wheat. We did not irrigate at night but stayed in the field until dark and got out just as early as we could see in the morning. I had a head and a half of water for irrigating my grain—by measurement 240-100 inches on the 160. I cannot reduce that to second feet, but the ditch rider told me that I was getting about a foot and a half usually, that is, about $1\frac{1}{2}$ second feet for the 160 acres. I used that head entirely in irrigating this 100 acres of wheat. My two men irrigated my 100 acres of wheat with that $1\frac{1}{2}$ second feet in from 21 to 25 days, but I do not know exactly how many days. I began irrigating my wheat the second time about fifteen days afterwards somewhere about the 10th of July. It took less time to irrigate it the second time, I think somewhere about fifteen days. With one man helping me

and with practically the same head of water, I only irrigated it twice and got a 26 bu. yield per acre. I had had the ground in wheat the year before this, being the third crop of wheat. I began harvesting it about the first of August. I don't recollect exactly, but the first of August is about the usual harvest time. I put a house and barn on my property in 1911 and a granary in 1912.

"Jos. E. Ferguson of Cripple Creek made the original entry. I purchased it from him in the fall of 1910, I think during the winter some time between 1910 and 1911. The water was on in 1914 practically continuously from the time I commenced to irrigate my grain. In 1913 I had about 140 of the 160 in wheat and the rest in potatoes and garden. There was only about five acres of potatoes. I have about six or seven acres that the lateral cuts off from my buildings and that was the second year that I had the ground in wheat. I don't recollect when I began irrigating my wheat in 1913—I think the latter part of May—I am not positive as to that. I had two men helping me irrigate my wheat all the time and part of the time I had three on the 160. I had another eighty at least that year but had another man working on it. I do not recollect whether I got water at the customary time in 1913 for the irrigation of wheat. I recollect 1912 quite distinctly, I think the first run in 1913 was for twenty or twenty-one days. The ditch rider told me I had a head of water of about one foot. I never kept any measurements. I am not personally familiar with the water measurements. I did not

get quite over my entire crop of 140 acres on that first run; I lacked about 10 acres of wheat. After that run I think the water was off for ten days. That is generally the system—generally the plan, that run. As I recall, they tried to establish a practice from the beginning of 20 days on and 10 days off, but it was not always practiced, however. The next run in 1913 was for fifteen or twenty days—I think it was fifteen, but do not know whether it was fifteen or twenty days, and cannot give the date when it was off, nor did I irrigate my wheat more than twice in 1913. As I ordinarily practice it, I irrigate wheat twice. I was supposed to have had one second foot head on the second run. It was very unsteady, however, both runs. I got over the wheat the second time at the expense of part of my other crop of potatoes which consisted of about five acres of potatoes. I had some alfalfa that year, but lost it—I did not get a stand. It was in the wheat, the wheat being used as a nurse crop, but there was only ten acres in alfalfa. I got fourteen bushels of wheat per acre that year. I did not measure what I got from the nurse crop outside of the other. It was all measured together, there being only ten acres of nurse crop which was just as good as the other.

“This was the first farming experience I had had in an irrigating country, but had farmed before, having been born and raised on a farm. But for ten years prior to coming to the Twin Falls country I had not been farming. I was a banker. I am a director of the Settlers Association.”

George Clyde Baldwin, being called and first duly sworn, as a witness for complainant, testified as follows:

"My name is George Clyde Baldwin. I am hydraulic engineer of the U. S. Geological Survey in charge of the water resources branch in the district of Idaho, and that district includes the county of Twin Falls. I have been so engaged in this particular position since July 1, 1911. It is one of my duties to measure the various streams in the territory I have referred to. I have taken measurements of the Salmon River which river the Board of Geographic Names has decided is the Salmon Falls Creek. The only measurement I have ever obtained in person was in 1910 but in co-operation with the Twin Falls Salmon River Land and Water Company—I believe that is the correct name of the company—and we have maintained a gauging station since the completion of the Salmon dam. That has been located above the backwater of the Salmon reservoir and below the mouth of Shoshone creek. That station has been maintained continuously at that location since some time during the latter part of 1910, I believe it is, I cannot tell exactly without looking it up; but prior to that time we had a station just above the dam and the old station was changed—was flooded out by backwater in the dam. The original station I think was established by the company, but the Geological Survey began its co-operative maintenance or really the assumed maintenance of the station, I think it was in co-operation with the company right straight

through, some time—let's see—I can tell the date of the year—in June, 1908, I believe was the first record. My department has taken measurements and made observations of the flow of this stream since that date.

“Our methods of measurement are two. First: Have a gauge of some sort on which the fluctuations in stage of the stream can be recorded. This gauge should preferably be located at a point in the stream where the relation between discharge and gauge height is as nearly as possible constant. This gauge is graded by obtaining current meter measurements, measurements with what is known as the Price type electric current meter, which is manufactured by W. & L. E. Gurley of Detroit. These measurements are made—from these measurements and the gauge heights at the time they are made, what is known as rating curves are platted. From these rating curves we take off what is known as a rating table, and this table is used to determine the actual discharge for each gauge height. Then the local observer obtains daily gauge readings, or, if it is an automatic gauge, of course a continuous record is obtained of all fluctuations in stage. Then by applying the mean daily gauge height to the rating table, we take out the mean daily discharge for each day; then these daily discharges are combined into mean monthly discharges and total run-offs for months, and for yearly periods. Our methods are, I think standard methods for handling the flow of large streams, and I think that, to the best of my knowledge they are the most

reliable which it is possible to obtain or which I know anything about, except you go to unreasonable and very great cost in constructing a weir or something of that kind. In recent years I know of the methods employed by the Land and Water Company in taking measurements of this stream, and within the last year or two the results obtained have been very close and have agreed very well with our measurements. It is my understanding that some of their measurements at early periods did not conform exactly with those handled by the Survey; of course, I am naturally a little partial to the Survey methods. I believe I know in what respects the Survey method and the Land and Water Company method differ, and they are as follows:

“Well I believe that they used what is known as the six-tenths depth method, that is, measuring the velocity at a point six-tenths of the total depth below the surface of the water, in most cases, where we would use what is known as the two-tenths and eight-tenths depth method, which is measuring the velocity at a point two-tenths of the depth below the surface and eight-tenths of the depth below the surface, and then taking the mean. Either of these methods are standard, but what is known as two-tenths or eight-tenths is generally considered to be a lot better, in cases where you have depth sufficient for that purpose. Another thing, in some of their earlier methods they used what is known as a standard cross-section, which is a cross-section determined by a level and rod. Now, in our work, we have found that unless

your stream is absolutely a solid rock bottom, that to use the standard cross-section is liable to introduce errors, because high stages of the stream, or even on low stages, the channel, unless it is absolutely solid rock, and sometimes even then, by a deposition of other material, may change a little bit. Of course, if that standard cross-section is checked up frequently enough it probably would be very good. But there is another point, where the bottom is composed of small boulders or coarse gravel, as I believe it is in the case of this particular station, to obtain a cross-section with a level rod you are apt to get depth a little too great; that is, the rod is apt to slide off the top of a rock and get down below, to boulders, and you would show a cross-section a little bit greater than would be the real mean if it was obtained by something with a little larger surface. Our method is to measure a cross-section at the time of each measurement. If it is a wading measurement, we use a rod with a little foot piece on it and try to get the mean cross-section by averaging the little drops and raises caused by irregularities of the bottom. And then we use what is called a torpedo weight on the bottom of the meter, and we sound with this weight on the line. That is a little bigger than the base of a rod, and I think that in many cases will give a little more closely the mean depth at any particular point, as it is not apt to sink down into a hole.

“We have compiled a plat or table showing the volume of water in the stream during the periods covered by our observations and have published rec-

ords for a number of years. They are not up to date in public form, but I have here a summary for the years beginning October 1st and ending October 1st, showing the runoff by months and years in acre feet."

Witness then indicated such table, whereupon it was marked plaintiff's "Exhibit No. 22," which is as follows:

Table 10. Plaintiff's Exhibit-No. 22.

MONTHLY RUNOFF OF SALMON FALLS CREEK BELOW LANDS OF UTAH CONSTRUCTION CO.

Quantities in Acre Feet.

MONTH	1908-09	1909-10	1910-11	1911-12	1912-13	1913-14	MEANS.
October		2,870	3,270	3,090	5,280	3,540	3,610
November		3,130	3,860	3,300	5,650	4,170	4,020
December		2,770	3,750	3,000	4,250	3,090	3,380
January		2,770	6,330	3,040	3,790	5,290	4,240
February		2,220	8,500	4,020	3,650	5,400	4,760
March		41,600	19,600	6,150	11,900	16,600	19,200
April		34,900	14,300	24,000	25,300	35,700	26,800
May		28,300	18,100	51,100	22,900	38,600	31,800
June	28,600	8,600	16,100	41,100	16,200	14,300	2,0900
July	5,100	24,50	3,360	8,180	5,010	2,200	4,380
August	1,990	1,600	1,370	4,450	2,480	1,430	2,220
September	2,310	2,200	1,530	2,860	2,010	1,710	2,100
YEAR	38,000	133,000	100,000	154,000	109,000	132,000	127,000

Daily Discharge May 29, 1910 to June 5, 1910 estimated at 272 second-feet. Discharge May 28, 1910 at Salmon Dam, 311 second-feet; discharge below Shoshone Creek, June 6, 1910 232 second-feet.

Witness further testified as follows:

"Table No. 10, marked 'Plaintiff's Exhibit No. 22, is the table I referred to as making a showing of the monthly runoff of the Salmon Falls Creek and the book and page is a part of the records of our office. I can and will have made a true and correct copy of this table. By the yearly mean of 127,000 acre feet is meant that the years for which we have total records on the climatical basis begin with October 1, 1909, and there are six years, from Oct. 1, 1909—no, five years, it is—until September 30, 1914, for which there are complete or practically complete records. There may be gaps of a week or perhaps even a month in one or two instances, which have been estimated, in order to complete the totals. This 127,000 represents the totals of the means for each month since we have had records at these two stations. Now, in October, November, December, January, February, March, April and May, those means are for five years only, but for June, July, August and September they are for six years, because of the fact that the record started in June, 1909. I don't know but that once before I said 1908; if I did, that was a mistake; it is June, 1909. So these means for the different months are taken, and then they are summarized to obtain the mean yearly runoff for the period of record. The 127,000 acre feet is the general average from the records that we have available."

On cross-examination, Mr. George Clyde Baldwin testified as follows:

“In preparing my curve for the year 1910 I cannot tell how many points I had from which to prepare the curve without recourse to our records. I made one measurement in person some time in the spring of 1910—I cannot tell you exactly when. Then there were, I think two or three more measurements obtained during that year. I made measurements in the year 1914 to ascertain what amount of water was taken by the Vineyard Land and Stock Co. on its lands above. That is what this report is. This report is a result of that investigation which was made in co-operation with the State of Idaho and the Salmon Falls Land and Water Company, I guess, and the Utah Construction Company. The total for that year of 132,000 acre feet represents measurements taken below the diversion of the Vineyard Company. In 1914 the total net loss due to irrigation of Utah Construction Company land or lands of the old Vineyard Land and Stock Company computed by one method is 9,580 second feet, and there is some discrepancy due to different methods used but that is due to the introduction of error, due to time interval, but between nine and ten thousand acre feet I think would be probably as close as I could give that. The total runoff of Salmon Falls Creek below all these diversions and below tributaries during the period of this special investigation which was from May 16, 1914, until September 30, 1914, amounted to 39,240 acre feet. The total diversion by the Vineyard Company, or what is really the Utah Construction Company now, was 17,206 acre feet. The water

returned amounted to 1829 acre feet so that the net diversion was 15,377 feet. The unmeasured inflow on the lands of the Utah Construction Co. or the Vineyard Land and Stock Co. amounted to 5797 acre feet, and a net diversion less the unmeasured inflow, gives us 9580 acre feet net loss on the lands of this Construction Company. The unmeasured inflow on the lands of the Utah Construction Co. is really the difference between—(that is, the summation of all the supply), we measured all the streams above points of diversion and subtract the total diversions and make allowance for return water that could be measured; then we had this record down below, all points of irrigation, and the difference between that shows the unmeasured inflow—that is about the only way we can arrive at it. I measured the stream above and below and all the places where I could find that the return water could be measured. I have records over at the office showing the periods for which the flow was estimated instead of having an actual record of it, but there is one period from May 29, 1910, to June 5, 1910, that I can give. That was the time the lower station was flooded out by backwater and the shift was made to the station up above the reservoir. There is a gap of that period. Our records indicated that the discharge of May 28th down at the dam was 311 second feet, and the discharge at the upper station on June 6th was 232 so that we arbitrarily estimated the discharge throughout that period as 272, which is practically the mean of those two discharges at the terminals of this period. I

guess I can't tell you exactly but the measuring station from which we now measure is about 200 yards down the stream from the entrance of the canyon about one-half a mile—I guess below the mouth of Shoshone Creek. I do not know the distance well enough over there to approximate that. Anyone who knows the country over there would tell you probably better than I. The company and the Department have been co-operating ever since I have been in charge of the work, and I believe that the co-operation extended back to the time when the Survey first took up the work, but I don't know without looking up the records just to what extent they co-operated at that earlier period.”

On re-direct examination, George Clyde Baldwin testified as follows:

“There are some 17,000 odd acre feet diverted for the Vineyard Land and Stock Company or the Utah Construction Company, and that water is used to raise a little grain, but it is used mostly for the irrigation of meadow and wild hay. Some of their lands have been irrigated for a long period, but it is my understanding that they have gradually increased the acreage under irrigation and that probably last year represented the maximum acreage which they have irrigated at any time prior to that. I would not say that 1914 was the first year that the maximum acreage was irrigated, but I think there was probably a greater acreage of land to irrigate during 1914 than any year prior to that. I don't think that all land owned by this company susceptible of irriga-

tion has now been brought under irrigation. The Utah Construction Co. can irrigate additional acreage over what they have now if they have the water for it. I don't know close enough to make an estimate of the total number of acres susceptible of irrigation above the Salmon River project upon this stream, and do not know the number of acres under irrigation for the year 1914, but some 17,000 acre feet were put upon the lands of this company."

On re-cross examination, George Clyde Baldwin testified as follows:

"There are three groups of land that the Utah Construction Company irrigated. I think it lies almost wholly in the state of Nevada. Their irrigated lands begin at the mouth of the Shoshone Creek and extend southward into Nevada bordering on both Shoshone and on Salmon Falls Creek. The lands extend southward into the state of Nevada from the mouth of Shoshone Creek down to the Hubbard ranch, that is, up the stream, and if you call south down, it is down; I should say, roughly, it is 25 miles, but I can probably give you something more accurate than that if you want to know it here. I would not say that the lands of the Utah Construction Co. extend continuously for 25 miles upstream, but it borders the stream.

"There are three principal tracts of land—that around San Jacinto and that up around what is known as the Hubbard ranch tract, and then there is another on one Shoshone Creek. It is just irrigated in spots or places, and that might be classed

perhaps as a 'shoestring ranch,' although the lower end down around San Jacinto broadens out into quite a wide tract there. I do not know whether this is the property that was formerly the Sparks and Harrell ranch. It formerly belonged to the Vineyard Land and Stock Co., and the Utah Construction Co. took their holdings but I am not positive about the ownership prior to that time. It was used as a stock ranch and for cutting hay. I think some new ditches were taken out last year or the year before, and I presume that is the cause of the large diversion in 1914. That would be my idea that on account of these new ditches the diversion was the maximum last year over any time up to that period."

On a re-direct examination, George Clyde Baldwin testified as follows:

"I believe that the waters so diverted by this company in 1914 are now in litigation in this court but am not positive about that of course."

William J. Trueblood, being called and duly sworn as a witness for complainants, testified as follows:

"My name is William J. Trueblood. I reside on the Salmon Tract south of Twin Falls and have lived there since the spring of 1911. I am a farmer and have been so engaged all my life and am a land owner upon the Salmon River Tract. My land is the NE $\frac{1}{4}$ of Sec. 4, Tp. 11, Range 16. I am the owner and holder of a water contract with the Twin Falls Salmon River Land and Water Company and secured the contract in the spring of 1911 or summer. I remember when the project was thrown open to entry

and was living at that time in Twin Falls or just adjacent to the town, and was selling milk at the time. I was on a milk wagon. I was present at the opening of this project.

"There was some discussion, or rather a public discussion that I heard relative to contracts or matters connected with the opening. By the 'opening' I mean a crowd was collected at the square where they were holding the drawing and this discussion was taking place. I could not state who the parties were that were discussing the matter of water rights. I was not acquainted with them at that time. I was simply an onlooker and was not particularly interested at that time in the Salmon River lands. I think there was someone there representing the Salmon River Land and Water Company but I do not know the parties. It was after this time I purchased or secured my water right. That was in the spring of 1911 by purchase. I was on the land before I secured title in March, 1911. It was in the summer that I commenced improving it. My son commenced improving it in the spring early in 1911. I have made good improvements, built a good farm dwelling, a good barn, and orchard, fenced and cross-fenced a pasture, and such things that go to make up a good farm home. It is practically all under cultivation at this time, except about four acres that are cut off by an old electric line; I think that is above the gravity flow anyway. The improvements are worth from seven to eight thousand dollars.

"The operation of this farm has been under my

personal supervision and control. I remember when water was first delivered out there. It was in June, 1911—the 17th day of June, the water came to my place. Water has not been delivered to me at the rate of $\frac{1}{2}$ inch per acre continuous flow from April 1st to November 1st during either 1911 or 1912 or 1913 or 1914, or in any year. I have discussed the matter of my water right with Mr. Darlington a time or two, and it was discussed in a general way at a certain meeting in Hollister on the 8th day of June, 1912. Mr. MacWatters was there representing the company with a proposition, and Mr. Hays was also present. My understanding was that Mr. MacWatters was at that time General Manager of the Land and Water Company and I understood that Mr. Hays was attorney of the company. Mr. MacWatters did not say anything about the water right as I remember particularly, but Mr. Hays discussed the water rights. In an after meeting a number of settlers brought up the question to Mr. Hays, and I am not sure but I think Mr. MacWatters was present, but anyway Mr. Hays made the assertion that they sold us simply an interest in some ditches in the Construction Company, and also said they didn't sell us any water right—that was the sum and substance at least of the words. I personally informed Mr. Hays as he was leaving the building that I would not pay any water installments whatever under those conditions except he got it from me by the courts. I have been ready and willing at all times and have been prepared to make payments, assuming that I received a water

right, and I told Mr. Hays that I was willing to make my payments if I had assurance of water."

On cross-examination, Mr. William J. Trueblood testified as follows:

"I don't know as I could tell you the exact dates I received water in the various years. The first year I know it was in June. I ain't sure, but I think it was the third of May, 1914, that I first received water. We had a very fair head to start in with—I think it was running about 70 corrugations."

The question was asked, "How many acres did you have in cultivation," whereupon the following proceedings were had:

Mr. Golden: We object to that as immaterial and improper on cross-examination.

Mr. Hays: I am trying to determine the amount of water we had, if your Honor please.

The Court: You make him your own witness in going into this matter. It is not cross-examination.

Mr. Hays: If the Court please, I want to get the line as to cross-examination with this witness defined a little better. They asked him whether he had received a certain head of water.

Mr. Golden: Not "head," General.

Mr. Hays: They asked him if he received a certain amount of water, 1-100 or $\frac{1}{2}$ of 1-100 per acre continuously, and I am now inquiring what head he did receive and for what time, and in order to determine the head I am asking about the acres he had in cultivation.

The Court: Well, if that is the purpose of it—I had supposed that it was admitted you were not furnishing water continuously.

Mr. Hays: That was covered by the stipulation made at the beginning.

The Court: Then why go into this at all?

Mr. Hays: They had gotten into it, and we desired to show what conditions really were upon that point, as to the time and amount of the delivery and method.

Mr. Longley: Of course, if the Court please, if we go into this matter, it adds nothing to the stipulation.

Mr. Hays: It does explain it, however.

The Court: Well, I think I will let him go into it, inasmuch as you asked the question on direct examination. I had overlooked that. It didn't strike me as being important, and I don't know why you should stipulate the fact and then spend so much time in going into it in the testimony of the witnesses. Proceed.

Whereupon the witness testified as follows:

'In 1914 I had 80 acres entirely in cultivation, but the west eighty I did not have control of because I had given an option. I haven't bought any more land within the last year. By a fair head of water I mean on the Salmon a head of water from what we were used to using on the Twin Falls Tract, and there we used 50 inches of water, or whatever is customary for eighty acres, and I was used to that head, and,

therefore, I bring it as a comparison on the Salmon. I judge we had a 50 inch head or a second foot.

"I bought my land after final proof had been made, but it was Carey Act land. I did not buy it from the Twin Falls Salmon River Land and Water Company. I assumed or bought the contracts for water from that Company, which contract for water had been made by my predecessor in interest. I moved on the Twin Falls Tract in the spring of 1907. In 1907, 1908, 1909 and 1910, before I made the purchase of the Salmon Tract I was in the milk business part of the time with farming in between times. I bought the land in June or July, 1911, from my son who was living on the land at that time. The majority of the improvements I put on the land myself and they have been put on from year to year, but the greater bulk was made, I judge, in the last three years. I am not a director of the Water Users Association but was at one time."

Whereupon the following proceedings were had:

Mr. Golden: I understand that the defendants have conceded that all of this land is dry and arid and requires the artificial use of water before crops can be raised on it. You deny that, Mr. Haga, in your answer, and that is the reason I ask the question.

Mr. Haga: I assume that it is Carey Act land and comes within the requirements of the law.

Mr. Golden: There is no harm in stipulating that, is there then, Mr. Haga?

Mr. Haga: That it is arid in character as re-

quired under the Carey Act law for the segregation of such lands from the public domain.

Mr. Golden: And requires the artificial use of water before crops can be raised on it.

Mr. Haga: Well, there is some dry farming in the neighborhood, I understand.

Mr. Golden: I would like to offer in evidence copies of the trust deed; copy of assignment of the water contracts, to A. C. Robinson which were stipulated before. Is there any objection to that?

Mr. Haga: No objection.

Mr. Longley: I would like to know, Mr. Haga, unless you will stipulate, if you are attempting to collect the payments due under these contracts.

Mr. Haga: I will stipulate that it is the intention of the trustee to collect so far as it can the payments under the water contracts deposited with the trustees as security for the payment of the bonds.

Mr. Longley: And are now attempting by at least two foreclosure suits in this court?

Mr. Haga: Yes, and others in contemplation.

Whereupon complainants rested.

E. B. Darlington heretofore duly sworn being recalled as a witness for defendants, testified as follows:

I am an engineer by occupation. I have been engaged in civil engineering since 1898. I started irrigation work in the State Engineer's office in 1903. I worked a year in the Reclamation Service and have been six years on this project, including the period of

construction. I have had occasion to observe the action of the system and use of water on the project during those years; that has been my business.

The system is a storage project depending upon the stored flow of the Salmon River which is impounded behind a large dam 230 ft. high of concrete masonry construction. It is 450 ft. in length on top and about 16 ft. wide. Its width is 110 ft. at the bottom. Defendant's exhibit No. 2 is a picture of the dam. The dam backs the water up the canyon of the Salmon River, and at a maximum stage it would extend back about sixteen miles, varying in width from a quarter of a mile to perhaps nearly a mile. It has a storage capacity of something like 185,000 acre feet, that is available for drawing out. The general outline of the reservoir is comparatively long and narrow, and the water is deep as compared with a good many other reservoirs. The water is drawn through a tunnel at a height of about 85 ft. below the top of the dam. The water below the tunnel is not available for irrigation. Up to that point the purpose of the dam is to divert water; above that, its purpose is to store water. It is capable of impounding approximately 185,000 acre feet above the tunnel. The tunnel is a little over 11 ft. square. The first tunnel is 1300 ft. long and the second tunnel 2200 ft. long, both of the size mentioned. Between the tunnels is an open cut. The main canal is 60 ft. wide. The water goes through the two tunnels and into a little lake or check basin for checking the velocity of the water coming from the tunnels, and is then taken through into the canal system.

The main canal is 60 ft. wide on the bottom; has a maximum depth of about 5 ft., and a capacity of 1000 second feet. The canal up to the first diversion has a capacity of 1200 second feet, beyond that a capacity of 1000 second feet. The main canal continues for about ten miles and is divided into two main laterals, each with a capacity of about 500 second feet. The main laterals are then subdivided into smaller laterals and are again subdivided until the whole project is served.

The character of the construction is exceptionally good. The system is well and carefully built, located by careful surveys, built under strict specifications. The structures have always been considered by engineers to be first class in every particular. They are made of concrete and steel, reinforced concrete.

The Company has records showing the runoff of the Salmon river watershed for the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914. Prior to 1911 Mr. Newell had charge of the records. For 1908 there was a runoff of 121,265 acre feet; 1909, 131,951 acre feet; 1910, 148,683 acre feet; 1911, 96,571 acre feet; 1912, 169,888 acre feet; 1913, 108,405 acre feet; and for 1914, 135,295 acre feet. The average for the seven years is 130,322 acre feet. This is for the calendar year beginning January 1st. That does not include the water diverted in 1914 by the Vineyard Land and Stock Company or the Utah Construction Company above our works. I am familiar with the development of those companies above our works. That was taken out above our measuring station.

Q. What amount of land did they have in cultivation at the time when we began construction?

Mr. Longley: That is objected to as being immaterial.

The Court: Apparently it is a material matter to know what the rights of that Company are. I am not sure that it will do very much good to just sort of skim over it. It may be that ultimately it will be an important matter to know what the rights of this Company may be, for they very much modify the rights of the Salmon River Company.

Mr. Hays: The Salmon River case itself is set for hearing on the 20th of this month, and we expect to try out the issues between those parties at that time.

The Court: It would seem to me, gentlemen, that about as far as you could go at this time with any success would be to show the amount of water that is thus diverted. I cannot try out here the issues without the presence of those parties. It may be ultimately that a decree in this case should be withheld until I reach a conclusion in the other case. On further reflection I think it would be better not to go into the matter fully at the present time.

Mr. Hays: Mr. Longley, is there any objection if that should, in the judgment of the Court, cut any figure here, as to the exact amount, that the judgment of the Court be withheld until the decision in that case on the 20th.

Mr. Longley: I take that as a matter for the Court to pass upon. I have nothing to say about it.

Q. These lands of the Vineyard Land and Stock Company, where are they situated?

A. They are in Nevada. The valley opens about twenty miles above the dam, and that extends about fifteen miles up the river in varying widths. The gauging station of the Geological Survey is about twenty miles above the dam, at the lower end of the Vineyard Land and Stock Company's holdings.

Q. Can you give us, Mr. Darlington, first, what is the action of reservoirs ordinarily with respect to the loss of water, if you know. I mean by that, what were the losses in the beginning and later on. Are there any changes?

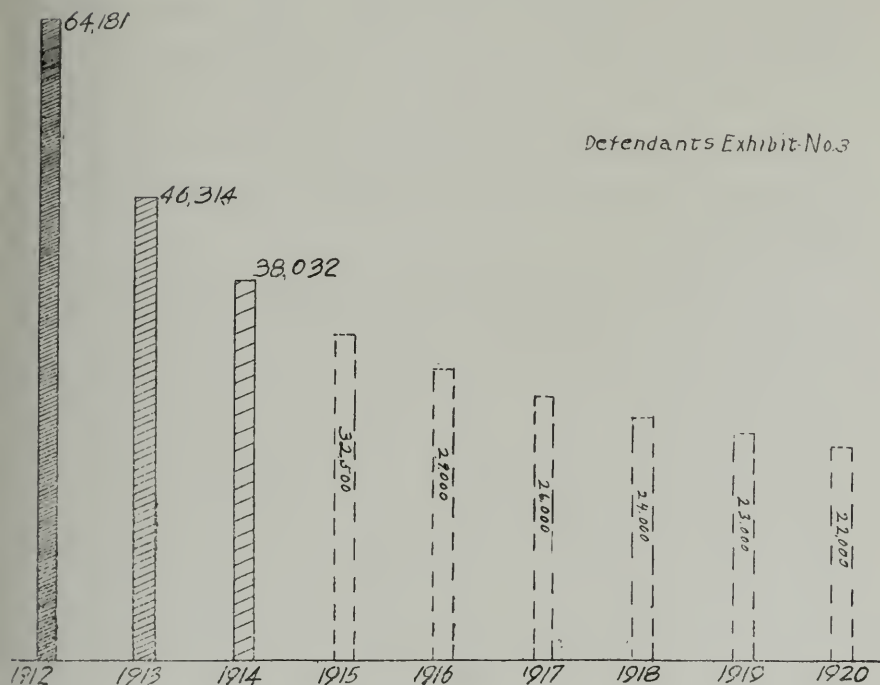
A. In my observation and experience, it is indicated that the losses are decreasing with the use of the reservoir, that they were very much larger in the beginning. The water rising in the reservoir has a puddling action. The bed becomes saturated. The sides become saturated further out each year, a little, and then as the reservoir drops down each year, some of that comes back. There is more or less return flow after a year's use. This diagram I have indicates the loss each year in acre feet for the years 1912, 1913 and 1914. The dotted lines indicate what may be expected in future, judging from the records of the past. That is, of course, problematical, but the record indicates a gradual increase in the efficiency of the reservoir.

The two items which make up reservoir losses are percolation and evaporation. The evaporation loss is practically constant. The percolation or seepage

loss is the one that is the changing factor. It reduces as the age increases.

(Defendants' Exhibit No. 3 was introduced in evidence and is the following diagram, to-wit:)

LOSS IN RESERVOIR IN ACRE FEET.



Q. What would you say, Mr. Darlington, from your experience of this reservoir, and your study of the subject, as to how many acre feet the ultimate losses in the reservoir would amount to?

A. Of course, that is problematical, but from observation and study of it, I would think the ultimate losses would come down to perhaps 15,000 acre feet.

Q. What part of that would be the evaporation loss?

A. About half of that would be evaporation loss.

Q. And the other half would be the seepage loss?

A. The experience of a good many reservoirs seems to be that the ultimate losses come down to about twice the evaporation loss. That has been the history of a great many reservoirs. The mean submerged area of the reservoir is about 2000 acres.

Q. Then the percolation or seepage loss would be the seepage loss as you have estimated it of 7500 acre feet occurring over an area of approximately 2000 acres?

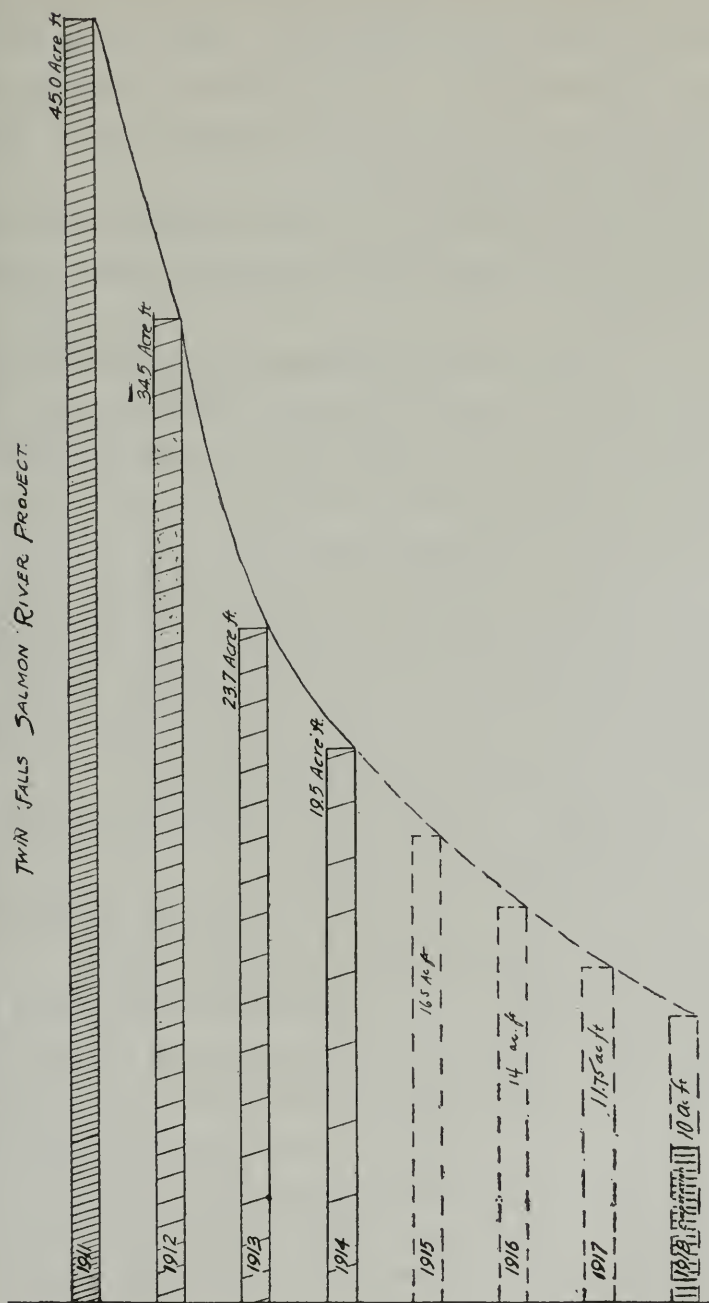
A. Well, the acre foot loss would occur over the reservoir at any stage; that would be a depth of something like $7\frac{1}{2}$ feet on an exposure of 2000 acres, that is, the total loss. I have here a diagram that shows the losses in depth on a mean submerged area. It shows the losses in acre feet on that area. In 1911 the loss was 45 ft. in depth, on each acre of mean submerged area. In 1912, it was $34\frac{1}{2}$ feet; in 1913, 23.7 feet; in 1914, $19\frac{1}{2}$ feet. The dotted line indicates what possibly we may expect in the future.

(Diagram Exhibit No. 4 introduced in evidence.)

RESERVOIR LOSSES PER SUBMERGED ACRE.

TWIN FALLS SALMON RIVER PROJECT.

Defendants Exhibit No. 4



In my opinion, however, the losses won't go down as far as that chart indicates. That goes down to the evaporation loss. In my opinion, the losses will not go down below twice the evaporation loss. That is, below the 15-foot point.

Q. Mr. Darlington, in your judgment, how soon would it get down to the fifteen-foot point, about what year?

A. I think you misunderstood me on the fifteen-foot point. It would be down to the ten-acre foot point on the mean submerged area, that would be about 15,000 acre feet, however.

Q. Yes, I misunderstood you.

A. Say we would have a total loss of ten feet in depth on the mean submerged area, and establishing this curve through the points we already have, and extending it, we would get down to that in about 1918. Of course, that is problematical.

(Diagram objected to in so far as it was justified by the opinion of the witness.)

Mr. Hays: It is simply an illustrative diagram, if the Court please. He has given the data.

Mr. Longley: As I understood the answer of the witness, he said in certain portions of the data the loss in his opinion would not conform to the diagram.

The Court: I think I shall sustain the objection and require the witness to remove that part of the diagram which he says is not in conformity with his judgment. I don't know why a diagram should be made in this way.

Mr. Hays: Mr. Darlington, will you please see that the diagram is corrected in conformity with your views?

Witness: Yes, sir.

Q. I call your attention, Mr. Darlington, to the irrigation system itself. Can you tell what the percentage of loss in the irrigation system has been for various years?

A. I can tell approximately what they were for 1911 and 1912, and definitely what they were for 1913 and 1914. The percentage of loss in 1911 was 70% of the quantity discharged at the dam. We had not definite measurements at the farmers' headgates that year nor the following years to determine accurately the amounts delivered to the farmers, and that is an estimate made up from the estimates of the ditch riders as to the delivery to the farmers and deducted from the total amount measured out at the dam. That is the percentage of losses in the canal system compared with the discharge at the head, at the dam, into the canal. We discharge a certain amount into our system and deduct the amount that we actually deliver to the farmers, and the balance is considered loss. In 1911 the total discharge at the dam was 22,843 acre feet. The estimated deliveries were about 6500 acre feet. They were not measured.

In 1912 the total discharge at the dam was 62,827 acre feet, the estimated delivery about 31,000 acre feet. In 1913, weirs were installed and the measurements taken at the farmers' headgates, and the total

deliveries were about 73,000 acre feet for irrigation. The total deliveries were 50,175 acre feet measured at the farmers' headgates. The water for domestic purposes and stock use was not measured. In 1914 the total amount used for irrigation was 103,000 acre feet measured at the dam. The amount delivered to the farmers at the farmers' headgates was 73,933 acre feet and 800 acre feet delivered to the Deep Creek Co.; that made about 74,700 acre feet. The evaporation on the surface of the reservoir is probably about 54 inches. We have no measurements on the reservoir, but that is the record of evaporation made by Don Bark under similar circumstances. My opinion is that the total losses will be twice the evaporation loss. That is, the seepage loss and evaporation losses will approximately equal each other. Defendants' Exhibit No. 4 illustrates the curve showing future improvement as near as we can tell from the records that we have. The percolation loss in the canal, when it is carrying water at various distances, is in proportion to the area covered by the water, and not in proportion to the percentage per mile, as is often indicated. For instance, take a canal of 10 ft. bottom width, with a foot of water and a foot of length, that will cover about fourteen square feet, and we have determined the losses to be about 9-10 of a cubic foot per day per square foot of area wet. If we assume that loss and a wet area of $14\frac{1}{2}$ sq. ft. per foot of depth, then we would have a percolation loss in that section one foot long, of 13 cu. ft. per day, and a discharge in the canal of say fifteen second

feet. If we assume it two feet deep, we would have a wet area there of 19 sq. ft. and a percolation loss of 17 cu. ft. per day, with a discharge of 66 second feet. Assume it three feet deep, and we would have a percolation loss of 21 cu. ft. per day and a discharge of 142 second feet, for that section, so that there can be no comparison between the amount of water carried and the loss. It is the area exposed that is the element that determined the loss. The water surface alone will determine the evaporation loss.

For what is known as the "A" system we turned in 19,277 acre feet in the year 1914. The number of acre feet used by the farmers was 14,227. The number of acres irrigated was 6,831; the transmission loss for the season was 5,049 acre feet, that is 26% of the water turned in. Under what is known as the eastern section, 13,810 acres were irrigated in 1914 and 37,078 acre feet of water delivered to that system, and 35,348 acre feet turned out to the farmers. The loss was 1730 acre feet. The percentage was about 4%. Under what is known as the central section of the system, 5123 acres were irrigated during that year and 15,980 acre feet delivered to that part of the system and 13,701 acre feet used or turned out to the farmers. The amount lost was 2279 acre feet, which is 14.3% of the amount diverted. In what is known as the western section, 3768 acres were irrigated, and 13,350 acre feet diverted for that section. Of this 9,256 acre feet were used. The loss was 4,094 acre feet, which is 30.6% of the amount diverted for that section.

That part of the country is very sparsely settled, and the water that is carried out there is very shallow in the ditches, and consequently a large area of ditch section is exposed in proportion to the acreage served. That is one cause of loss. Another cause is that the system is very long and sinuous, and perhaps the percolation in that section of the tract is a little abnormal. The percentage in the southern section is 26%. The reason is that it is close to the dam. There is no silt carried from the dam into that part of the canal. No water drains into it from any other system. It is high, the high line of the system. The soil is a little more gravelly than the other part of the system. We have considered the question of eliminating the western section altogether. The change would take place by cutting it off about where the cross is marked. The plan would be to extend another lateral a little further around the hill and cover the same territory now covered by the long lateral. I am speaking of the western section. The check basin is a small lake at the outlet of the tunnels. Its purpose is to check up the velocity of the water coming from the tunnels and to give a little elasticity in the operation of the system. It is under consideration to eliminate that and construct a ditch around it. The area of the check basin is about 80 acres. The losses in the check basin are about nine tenths of an acre foot per day per acre. Based on an area of 90 acres and a proposed area of the ditch line proposed, about ten acres, we would save an exposure of about eighty acres there. Eighty acres at nine-

tenths of an acre foot per day would be about 70 acre feet per day that we would save. That would be a flow of about 35 second feet. It is our idea that a ditch around this check basin would reduce that.

Cross-examination by Mr. Longley:

Q. Mr. Darlington, let me first inquire if, in giving your opinion as to the ultimate loss in transmission, you have taken into consideration these proposed improvements?

A. No. In that estimate I gave I hadn't considered the improvements.

Q. At all?

A. No.

Q. So that the improvements didn't enter into your opinion heretofore given in your testimony?

A. No.

Q. Now, you have acted as the chief engineer of this Land and Water Company up to the present time?

A. Yes, for the last four years.

Q. And have recently certified as to the completion of the system, or what is the fact concerning that?

A. I certified as to the completion about two years ago.

Q. Have you recently certified as to its completion?

A. Yes, I believe so.

Q. And in the certificate did you make any mention of the fact that this check basin was losing prac-

tically 70 acre feet per day, or a saving of that much, rather, could be made by constructing a proper ditch or canal?

A. No.

Q. Yet these check basin losses have continued and been present each of the years of the operation of the system?

A. Yes, they have been present. They are improving, though.

Q. Can you give the losses for 1912 and 1913?

A. No, I haven't them at hand.

Q. What would you say as to these losses being excessive and unusual, or just ordinary losses, as concerns this check basin?

A. The losses in the check basin are very moderate for the area exposed.

Q. How many miles of main canal, insofar as evaporation and seepage are concerned, would be the equivalent of the check basin?

A. The present length of the main canal exposes just about the same area as the check basin.

Q. And the length of the main canal is what?

A. Eleven miles.

Q. So that in eleven miles of main canal you only lose the amount of water lost in this check basin?

A. Yes.

Q. And what length of canal would be required to pass the water through or around this check basin?

A. About 4,200 feet.

Q. Less than a mile?

A. Yes.

Q. Your certificate was that the system was completed in a good and workmanlike manner, or have you a copy of that certificate?

A. I don't remember the terms of the certificate now.

Q. You don't remember anything about that?

A. No, I don't remember that.

The witness further testified:

The difference to be found in the method of our measurements of the flow of the stream and the Geological Survey is found both in the projecting of the rating curve and in the actual measurements taken. We take our measurements a great many more times during the year than they take theirs. River stream measurements depends upon the factors of the velocity of the current and the depth of the reading, the sounding of the stream. The Geological Survey makes but about two or three soundings through the season. We make a sounding at every measurement, at the end of every month, and a rating, at the same time, and we have a great many more points on our curve, to determine that curve. For that reason I have always been of the opinion that our curve was more accurate. I know of a reservoir a good deal similar to ours, the Goose Creek reservoir, and while the sides of the reservoir are not altogether similar, are practically similar.. I don't

know the amount of water stored in the Goose Creek reservoir, or the percentage of loss. At the Salmon dam, the lava rock is exposed and extends back from the dam along the sides of the reservoir for a quarter or a half mile. There has been some leakage back into the canyon from the tunnel leading from the reservoir. I cannot say as to what that loss was due to. Aside from the Goose Creek reservoir, I do not know of any other reservoir in the world having lava rock sides or other soil or geological characteristics similar to those found at the Salmon dam. The Oakley reservoir has been operated two years and the Salmon has been operated longer than that.

Re-direct examination:

Now the difference in elevation of this tract from the north end to the south end is about 1000 ft., and the elevation of the north end is about 4000 ft., and of the south end about 5000, with some little difference in climate. The elevation of the reservoir is about 5000 ft.

There is some water in the stream below the dam, but we can give no measurement except one taken with the State Engineer, when we found $4\frac{1}{2}$ second feet running at that time. Last year a number of gauge readings were taken showing the flow to be decreasing. This dam diverts the entire flow of the stream. I do not know of any unusual features about this reservoir which would affect the loss by seepage. In the western section the loss was due to some extent to the fact that there were only a few farms being irrigated. Contracts are out for the

land under that portion of the system on which water is not being used, a large part of the territory being held by people who do not use the water or cultivate their property. This section has not developed as rapidly as the balance of the system.

Re-cross examination:

At the close of the season of 1914 we had in the reservoir something like 16,500 acre feet and through the summer 800 acre feet were delivered to the Deep Creek Company, and the lands of that company on which this delivery was made are not included within our water contracts, and the water so delivered to this company would have been available for distribution.

Re-direct examination:

In figuring the length of time which it would take to use the water that would be in the reservoir on the first of May, delivering it on the basis assumed by counsel in his question, of one-half miner's inch per acre, I took into consideration the entire season's loss for the reason that it was the assumption made by counsel. I did not take out the loss for the period that it took to deliver the water. I took it for the whole season. Those conditions would not apply to the conditions that actually obtain in the distribution of water. Those figures are of no practical value in this matter.

Re-cross examination:

I simply took the assumptions made in the questions and responded to them in my figures yesterday.

(At this point discussion occurred as to the facts on which the witness' answer was based. It was understood that Mr. Longley would write out the question and present it to the witness and that he would thereafter answer it, as it took some time to make the necessary computations.)

And thereafter the witness was again called to the stand in relation to this matter and thereupon he submitted the following written answer, which was marked Plaintiff's Exhibit No. 23, and is in words and figures following, to-wit:

PLAINTIFF'S EXHIBIT NO. 23.

1st Question:

Assuming that there is 25,000 acre feet in the reservoir on March 28th; that the river should flow the same quantity as in 1914; that the reservoir and canal losses be the same as in 1914; that the full project, viz., 73,000 acres, should require water; that the delivery should commence May 1st; that 1-100 of a second foot be delivered per acre, how many days would elapse before the reservoir would be empty (to the tunnel lever)?

Answer:

25,000 acre feet—March 28th.

1,560 Run-off to Apr. 1st.

26,560

70 Loss to April 1st.

26,490 Storage April 1st.

39,128 Run-off in April.

65,618

8,283 Loss in April.

57,335 Storage May 1st.

39,928 Run-off in May.

97,263

9,014 Losses in May.

88,249

62,248 Drawn off in May.

26,001 Storage June 1st.

11,420 Run-off to June 17th.

37,421

2,940 Losses to June 17th=17-30 of 5199.

34,481

34,136 Drawn off to June 17=17x2008.

73,000 acres, served at the rate of one second foot per 100 acres, would require a head of 730 second feet, or 1,460 acre feet per day. To provide for canal losses at the rate of 27.3% of total diversion, it would be necessary to turn out 1460-0.727 acre feet per day, or 2008 acre feet per day.

2nd Question:

Same assumption, except that $2\frac{3}{4}$ acre feet per acre be delivered at the rate of 1-100 of a second foot per acre, how many acres could be supplied?

Answer:

To deliver $2\frac{3}{4}$ acre feet on one acre would require a continuous flow of 1-100 of a second foot for 137.5 days.

137.5 days from May 1st equals September 15th.

26,560 Storage Apr. 1st.

39,128 Run-off for April.

39,928 Run-off for May.

14,401 Run-off for June.

2,015 Run-off for July.

1,312 Run-off for Aug.

530 Run-off to Sept. 15th.

123,874

Deduct losses—29,385 acre feet.

94,489 acre feet available for use.

Losses.

70 Loss for March.

8,283 Loss for April.

9,014 Loss for May.

5,199 Loss for June.

2,602 Loss for July.

3,212 Loss for August.

1,005 Loss to Sept. 15th.

29,385

At rate of $2\frac{3}{4}$ acre feet delivered at reservoir,
34,500 acres could be supplied.

At rate of $2\frac{3}{4}$ acre feet delivered at land with
canal losses of 27.3%, 25,100 acres could be supplied.

Answer (2nd part) :

25,000 acre feet, March 28th.

1,560 Run-off to Apr. 1st.

39,128 April run-off.

39,928 May run-off.

14,401 June run-off.
2,015 July run-off.
1,312 August run-off.
530 to Sept. 15th.

123,874 acre feet.

Deduct losses— 6,995 acre feet.

116,879 acre feet available.

Losses.

120 March.
1,250 April.
1,250 May.
1,250 June.
1,250 July.
1,250 August.
625 to Sept. 15th.

6,995

With 116,879 acre feet available, and deliveries at the rate of $2\frac{3}{4}$ acre feet per acre on the land, and canal losses of 15% of total diversions, 36,185 acres could be irrigated.

With 116,879 acre feet available, and deliveries at the rate of $2\frac{3}{4}$ acre feet per acre at the reservoir, 42,500 acres could be irrigated.

3rd Question:

Same assumptions, except that reservoir and canal losses be assumed at what you have testified they will ultimately be?

Answer (1st part):

25,000 acre feet March 28th.

1,560 acre feet run-off to April 1st.

26,560

120 Loss to April 1st.

26,440 Storage, April 1st.

39,128 Run-off in April.

65,568

1,250 Loss in April.

64,318 Storage, May 1st.

39,928 Run-off in May.

104,246

1,250 Loss in May.

102,996

53,258 Drawn off in May.

49,738 Storage, June 1st.

14,401 Run-off in June.

64,139

1,250 Loss in June.

62,889

51,540 Drawn off in June.

11,349 Storage July 1st.

274 Run-off to July 6th.

11,623

240 Loss to July 6th.

11,383

10,308 Drawn off to July 6th.

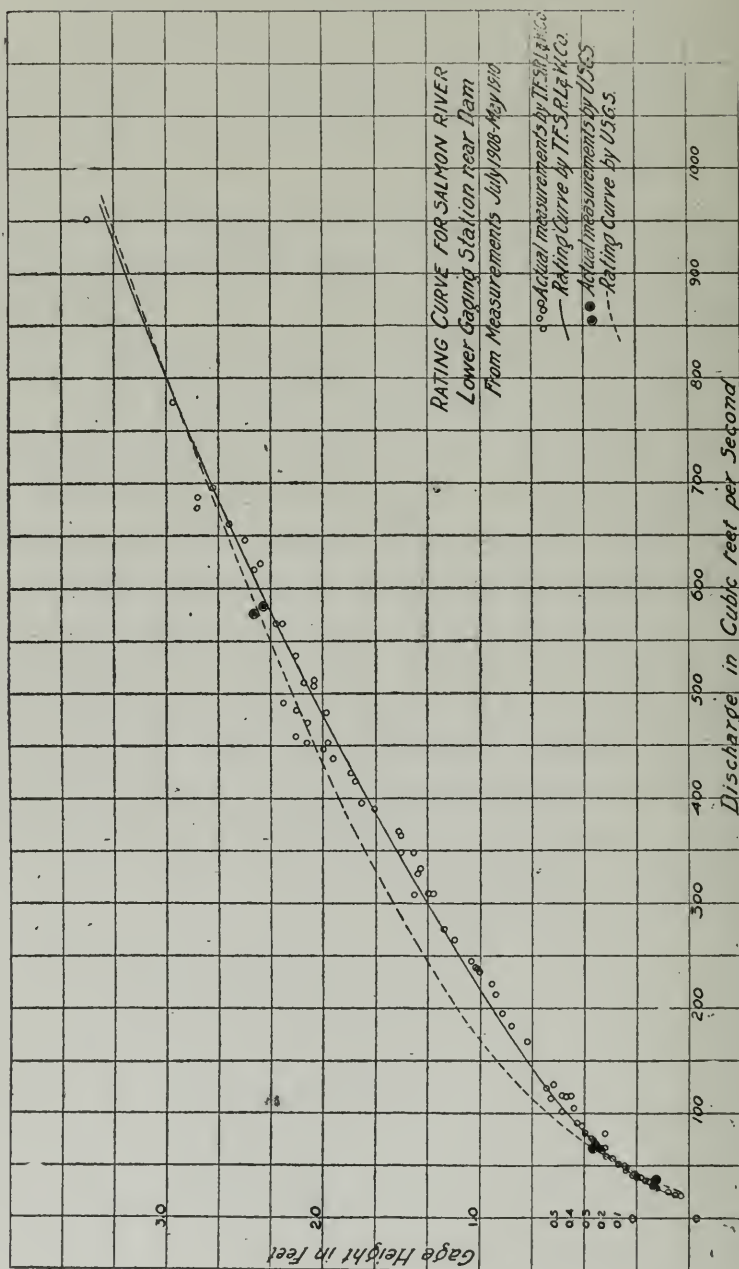
1,075

Head of 730 second feet would have to be increased to 859 second feet to provide for 15% canal losses, equals 1,718 acre feet per day.

R. J. NEWELL, being called and first duly sworn as a witness for defendants, testified as follows:

The method of making rating curves by the Government and by the Company showing the runoff of the Salmon River is just the same. The Government rating curve for the station on Salmon Project, however, is based on five measurements, while the Company curve is based on ninety-four measurements. That is the reason for the difference between the amount of water from June 1, 1909, to September 30, 1910, which is 17,500 acre feet, as shown by the charts, defendants' exhibits 12 and 13, which exhibits are as follows:

Defendant's Exhibit No. 12



DEFENDANT'S EXHIBIT NO. 13.

Monthly Runoff of Salmon Falls Creek Below Lands of Utah Construction Company.

Month.	Quantities in acre feet.					
	1908-09	1909-10	1910-11	1911-12	1912-13	1913-14
October .....	.....	2,830	3,530	3,250	5,630	4,080
November .....	.....	4,040	4,190	3,480	5,700	4,400
December .....	.....	5,170	4,470	3,120	4,700	3,740
January .....	.....	4,160	7,570	3,200	3,980	5,390
February .....	.....	5,400	9,440	4,240	3,970	5,440
March .....	.....	43,700	18,930	5,950	11,960	16,830
April .....	.....	36,390	13,040	23,390	25,950	39,190
May .....	.....	30,770	15,930	54,910	23,170	39,990
June	29,960	* 9,630	15,140	44,250	16,790	14,420
July	6,000	2,650	3,390	9,130	4,990	2,020
August	1,680	1,520	1,550	5,460	3,000	1,310
September	2,090	2,300	1,720	3,600	2,550	1,500
Total	39,700	148,600	98,900	164,000	112,400	138,300

NOTE: From records of the Twin Falls, Salmon River Land & Water Company, based on rating curve of lower station up to June 6, 1910.

R. W. FARIS, being called and first duly sworn as a witness for defendants, testified as follows:

I have been a civil engineer for about 25 or 26 years, and have been connected with several irrigation projects, and built the main canal of the Salmon River Project. I am familiar with canal and reservoir losses, and have made personal experiments as to the loss from evaporation in shallow fresh water. The loss from evaporation in deep reservoirs is much less than in shallow small areas, and I am familiar with this reservoir and canal system, and from my study of this subject of losses from evaporation in general, and the comparison of this reservoir with other reservoirs, it is my view that the loss here will be about 4 feet per annum. I have made some experiments relative to reservoir losses due from seepage. I think the seepage losses on this reservoir would be greater than the evaporation losses, and that they would be approximately 7600 acre feet for the average amount of water impounded. In the absence of exact determination, it is the rule for engineers to assume that percolation losses will be ultimately equal to the evaporation loss.

On cross-examination Mr. Faris testified as follows:

My opinion that percolation losses are equal to evaporation losses is based upon Government records of reservoirs similarly situated as this one, so far as the nature of the surrounding rock is concerned.

Whereupon the following proceedings took place:

Mr. Longley: At this time, if the Court please, I move to strike all the testimony of the witness from the record, on the ground that it affirmatively appears that this testimony as to evaporation and seepage losses is not predicated upon any reading of similar conditions or facts, or circumstances, surrounding the conditions of this Salmon River reservoir.

The Court: I think I shall let the testimony stand as being competent. It might throw some light upon it more or less, as the facts develop.

On re-direct examination the witness testified as follows:

At the Sweetwater reservoir in California the evaporation was found to be $41\frac{1}{2}$ feet, and in that instance the percolation losses were found to be practically nil, owing to the return flow from the water apparently lost in storage having filled the interstices and ran back. In the case of the Clear Lake reservoir in Oregon the percolation losses were 60% of that due to the evaporation. In the Cold Springs reservoir in Oregon, at the end of the fourth year, the seepage losses were nearly double that due to evaporation, but that was accounted for by some direct leakage from the reservoir through the rocks adjacent. In the East Park reservoir in California the evaporation is found to be about 54 inches, and percolation losses are—the carbon is blotted, but I think it is 48. I have a clear copy of it that I can supply. The data as to losses in reservoirs in this country is very meager. I have the record of a great many reservoirs in India, and in other countries,

but as to physical conditions as compared with the Salmon I haven't the information.

On re-cross examination the witness testified as follows:

That the rule of ultimate percolation losses being equal to evaporation losses is empirical, based upon observation and experience, but one doesn't affect the other. The lava rock formation around this reservoir isn't conducive to excessive losses in that it isn't a stratified formation, and in that the fissures are not continuous. I would like to say that my assumption as to transportation losses took into account the elimination of the check basin.

G. M. HALL, heretofore duly sworn, and being recalled as a witness for defendants, testified as follows:

The total acreage of outstanding contracts January 1st was 73,348 acres. Of that total 65,727 acres was Carey Act land, and 4,939 acres were desert land, and 1,903 known as scripped lands, and 779 acres school lands. On January 1st, 44,022 acres of Carey Act land had been proved up, and 21,711 had not been proved up.

Whereupon the following proceedings were had:
By Mr. Hays:

Q. Of that 21,711 acres, how much was occupied or settled upon, and how much was not entitled to make final proof, that is what acreage had defaulted?

Mr. Longley: We object to that part of that question as calling for a conclusion of the witness and not a statement of any fact.

The Court: Sustained.

Mr. Hays: I will ask you, gentlemen, upon the other side: There is a large acreage, as you are well aware, upon which none of these Carey Act entrymen have made any annual proof since the time they made the entry, and no final proof. The acreage covered by those entries is, as you know, something like 16,000 acres.

Mr. Longley: If that is the purpose of the question, we have no objection.

Mr. Hays: That is the purpose. I desire to show by this witness that the acreage of the remaining valid outstanding Carey Act entry, as near as I can—

Mr. Longley: No objection.

Whereupon the witness further testified:

Of the 21,711 acres not proved up there were about 16,000 acres on which no cultivation had been made, and on which no one was living, and there were about 5,700 acres which were occupied and farmed, on which the people were living, but had not yet made their final proof, but could do so at any time. Eliminating the entries where there has been no cultivation and settlement, the net area of the project is about 57,348 acres.

E. B. DARLINGTON, heretofore duly sworn, being recalled as a witness for defendants, testified as follows:

The high-water period in the reservoir in 1911 was June 18th, in 1912 June 19th, in 1913 June 20th, in 1914 June 6th. The canals were designed and

constructed with an excess capacity of about 20% over the specifications. That is, the exact specification for carrying one one-hundredth of a second foot, or one second foot per hundred acres. They were built with a capacity of about a second foot for 80 acres. The system was originally built for 100,000 acres, the main canal for 125,000 acres, with 1,250 second feet capacity. One of the reasons for the comparatively small amount of water in the reservoir at the present time is lack of precipitation. The other is that the Vineyard Land and Stock Co. took more water than ever before.

Mr. Hays: Mr. Darlington, what were the facts with regard to the water delivery on the part of the Company and of the supply that you were delivering and had charge of?

The Court: Counsel is trying to account for the condition of the reservoir at present, and for that purpose the witness may answer this question, whether more water was delivered last year to the farmers than in previous years.

A. Yes, it was.

Whereupon the witness further testified:

It is my business to superintend the canal system and look after it, and I observed very carefully the method in use among the farmers with regard to use of water last year, and as compared with the use other years.

By Mr. Hays:

Q. And what was that method of use, compared with other years?

Mr. Golden: We object to that on the ground that it is incompetent and immaterial, your Honor.

The Court: He may state whatever the facts are. It is simply calling for comparison of the use as between the several years. It isn't calling for a conclusion of the witness as to whether an unnecessary amount was used last year.

Whereupon the witness further testified:

More was used last year than in previous years, and more was wasted last year than in previous years.

I roughly estimate at the present time that the area represented by what might be called the wetted perimeter of the canals is in the neighborhood of 400 acres.

Re-cross examination:

Mr. Longley:

Q. Now, I will propound this question to you, Mr. Darlington, or rather, the three questions I have here, and then give you this slip of paper, and ask you to make the computation called for by these questions. Assuming that there is 25,000 acre feet in the reservoir on March 28th, that the reservoir should flow the same quantity as in 1914, that the reservoir and canal losses would be the same as in 1914—

A. For that same period?

Q. Just a moment. That the full project, namely, 73,000 acres, should require water, that the delivery should commence May 1st, that one-hundredth

of a second foot per acre be delivered, how many days would elapse before the reservoir would be empty to the tunnel?

A. That is the original question, as I understand?

Q. You did understand it?

A. That is the original question that you first asked me.

Q. Yes.

The Court: Now, right there, you understand, Mr. Darlington, counsel wants you to calculate the acreage and also the loss, during that period, not during the whole season, but just during the period when water would be used.

Q. There ought to be another assumption also, your Honor, to determine what rate of flow. That isn't the practice of running water, to start with the maximum amount and run continuously.

The Court: He is asking you a certain question. This would seem to be definite enough.

A. I think that is definite enough.

Mr. Longley: Assuming the same facts, except that two and three-quarter acre feet of water be delivered at the rate of one-hundredth of a second foot per acre, how many acres could be supplied, assuming the same facts, except that the reservoir and canal losses be assumed at what you have testified they will ultimately be, and apply the question of the reservoir and canal losses to both of the questions I have previously asked you and inquired about, that

is, the length of time your reservoir will hold out and as to the number of acres which could be supplied?

Mr. Haga: I want an objection to all three of those questions, on the ground that they are purely moot questions, and they relate to matters that could not obtain in actual practice, and that the answer could be of no practical benefit to the determination of the matters involved in this case.

The Court: Overruled.

Mr. Longley: That is all.

(NOTE: To the foregoing questions, the witness answered by plaintiffs' Exhibit No. 23, heretofore set forth.)

On re-cross examination the witness testified as follows:

In 1914 there were 405 water users cultivating about 30,000 acres of land. Approximately 4,849 acre feet were delivered at the reservoir for domestic purposes during the year 1914, but that amount is not an average delivery; it is excessive.

Whereupon Mr. Hays, of counsel for defendant, offered in evidence a certified copy of the minutes of the Land Board, releasing 35,458.72 acres of the Salmon River segregation, order made on August 13, 1912, which was admitted and marked Defendants' Exhibit No. 17. An order of the Land Board of April 23, 1908, throwing open for entry 90,000 acres of land under the Salmon River project, to be opened June 1st, 1908, was then offered in evidence by Mr. Hays, of counsel for defendants, and marked Defendants' Exhibit No. 18, and admitted.

WILLIAM WAYMAN, being called and first duly sworn as a witness for the defendants, testified as follows:

I was born and raised on a farm in Iowa, and for a number of years since leaving Iowa have been in Utah, and for about 14 years was in Idaho, and am at present living in Montana. Since leaving Iowa I have been constantly engaged either in farming or handling farming operations, and was in the Indian Service in Utah for over ten years, in connection with the Uintah Indian Reservation project. I have carried on farming operations in various places in Idaho and have leveled and smoothed raw lands, and am familiar with the flooding and also the corrugation system of irrigation. In 1912 I was over the Salmon River project and made a personal inspection of all the farm units on the tract, with a very few exceptions, and am familiar with the Twin Falls South Side tract adjoining the Salmon River project. In the newer countries the lines of least resistance are followed by the farmers in irrigating, and often little attention is paid to the proper preparation of the land, but as the farmers have become in better position to cultivate their lands, and to farm with more stock, the lands are better leveled. It pays, however, to smooth up the lands from the first. The better preparation and more smoothing they receive, the easier and better and more evenly can water be distributed on them. For some soils the flooding method is popular, and for others a check system is used, but the best usage today on the greater majority of land

is what is known as the corrugation method, which consists of marks being run down grade, not always down the steepest grades of the land, and placed from two and half to five inches in depth and from two to three feet apart. The ordinary volcanic ash soil of Idaho requires corrugations about two feet apart, from that to twenty-six inches, to secure the best results, and in order to economize water on the majority of the volcanic ash soils, I would not put my corrugations longer than three hundred feet. If the corrugations are longer than that, water is wasted by percolating below the proper root zone of the plants. This waste water below the root zone fills up the lands and makes them valueless for agriculture if this water is not afterwards drained off. I am familiar with the growth of crops on the Salmon River project, and that part of the country.

Upon being asked how frequently it will be necessary to irrigate in that district, the following proceedings took place:

Mr. Golden: At this time, your Honor, we object to the question, and this line of examination, upon the ground that it is incompetent, irrelevant and immaterial, and in no way raised by the pleadings in this case, not an issue germane to the case, this testimony not germane to any issue. Furthermore, because the right, if any, of the parties, that is, the complainants and the defendants, are fixed by a written contract. Any testimony that would tend to explain or vary the terms of the contract would be wholly incompetent and inadmissible. I

understand, if your Honor please, that the theory upon which the case is tried, or can be tried, is that the rights of the respective parties to the action are fixed by a written, specific contract. No plea is made in the answer that there is any ambiguity existing in the contract, nor any efforts made to re-form the contract. This question is not injected in the proceedings, but on the contrary it is averred by the defendants, and all of them, that if any right exists in favor of the complainants for the delivery to them of any water, it is only by virtue of a proportionate interest in the contract, the issue being a square-cut one, solely fixed by a contract, and no ambiguity being pleaded, your Honor, or mistake of facts, or otherwise, mutual mistake between the parties, and we submit it is wholly incompetent and immaterial how these lands should be irrigated or farmed, or how much water should be used on them, unless it be that it will be the contention now of the defendant that there is an ambiguity, which the Court must construe or determine, in these written contracts. I may suggest, with your Honor's permission, that the precise question was raised upon the motion to dismiss, and your Honor there held that these contracts meant what they said, and you did so construe them at that time. So I say now at this time it is immaterial what method of farming was used or what method of farming is used by the settlers, their rights being fixed by a contract must necessarily be such, and are such, that they can't be varied by any testimony of this kind. And further, if the Court please, we wish to raise by this objection to the testi-

mony at this time the same question, if the Court will observe, as by our motion to strike certain portions of their answer.

The Court: This seems to be the same question that was presented at that time, I am very much in doubt as to what course to pursue. So far as the mere construction of this contract is concerned, this testimony is not material. The doubt arises because of the uncertainty as to the relief prayed for or the relief which can be granted, provided I shall ultimately take the view of the contract contended for by the plaintiffs. I thought possibly this testimony might be heard for the purpose of enabling the Court to grant some sort of practical relief.

Mr. Golden: This is perhaps an unusual case, that is, with reference to the relief, because like questions have not been raised, insofar as we are advised, upon any Carey Act contract. Our view of the situation is that whether the Court enters a decree of specific performance or quieting the title in the complainants to so much water, as per the contract specified, it is of no material consequence, and the sole relief that these complainants can ask for or can possibly expect from the Court was indicated by your Honor upon the motion to dismiss, and that is this, that, insofar as they were concerned, when the contracts were put in evidence, they had made a prima facie case as to their relief under the contract. Now, we ask for that relief.

The Court: What sort of relief could I grant in this case, provided I take the view for which you

contend, that is, suppose I take the view that the contract calls for water at the rate of half an inch per acre continuous flow for the specified season, what is going to be the decree?

Mr. Golden: That it be adjudged and decreed by this Court that these five or six complainants would be entitled under their contract to a permanent water right and to receive and have delivered to them, according to the terms and conditions of these contracts, the amount of water specified in the contract.

The Court: Suppose there is an insufficient supply of water for that purpose, for all the contract holders, I can't decree to these plaintiffs rights which would deprive all other parties of the same right, can I?

Mr. Golden: I think so, your Honor.

The Court: Suppose that half the contract holders were before the Court, and hold contracts which, with the construction that you ask we put upon it, would absorb all of the available water supply, could I require the defendant company to deliver to those plaintiffs all of the available water supply, to the exclusion of all other farmers who are not parties to the contract?

Mr. Golden: Your Honor could, and this is the situation, that either the contracts mean what they say or they mean nothing. Now, if, in the first instance, the Court determines that each person who comes here and asks for the relief sought by these

complainants, is entitled to the relief, for the purposes of this action, for the determination of the rights of the persons who seek relief, it is immaterial whether or not, by some misfortune or other, like relief cannot be granted, that is, directing the delivery of the water, the action being purely one to adjudicate one particular fact; was it required by these contracts on the part of the vendor to sell and deliver certain specific property, that is, this water? That adjudication being made, your Honor, that settles the issues there. Now then, the situation which arises is this, that because of the inability of the vendor, by reason of the insufficient supply of water, to perform all of these contracts, then it becomes, and it has been shown by other testimony, it becomes unable to respond to its obligations. Then the Court would be authorized, in view of the situation, to take charge of the project, appoint a receiver, if necessary, or receivers, and take possession, and collect the funds that may be paid by such parties as the record shows may be supplied with water, according to the contracts, and the moneys so coming from those sources may be applied toward refunding to the persons who are unable to get the water, indemnities, for what they have suffered by virtue of the failure of the company to carry out its contract. That is the view we take in this case, your Honor. That is the view that we have had on the motion, although the relief prayed for in the bill specifies that, and perhaps goes a little farther, but that is as far, I believe, as we could urge the Court, that we were en-

titled to relief in the action. Now then, let us go to the other proposition. If these contracts mean what they say, how does the fact that there is not sufficient water become material or germane to the issues, because the Court would necessarily, because of the injury to a great number in the first instance by the act of the defendant in selling something it did not have, refuse to carry out the plain provisions of the terms of the contract, on the theory that a wrong might be committed to them, but if the wrong was committed this company should respond and be made to respond to the persons who were wronged by the entering into of these contracts. So that the fact that there wasn't sufficient water, your Honor, to supply all the contract holders, could in no way affect the rights of these complainants. It is no fault of theirs, no fault of any of the contract holders. It is the fault of the company, the vendor in the contract, because they must have known, and the law will presume that they did know, what they were doing when they made these contracts. Now, this company, if it appeared to the Court that it cannot supply all of the contract holders with the water required to be furnished by the contracts, then I say it is the duty of this company to respond to the persons to whom water cannot be furnished, for their damages for this breach of contract which they have made. And that is the object of the prayer for relief, or the relief sought for in the appointment of a receiver, that the money collected for all water available to these contract holders might be held by this Court, so that the other contract

holders who have suffered wrong might not go hence without some compensation.

The Court: Your idea would be that the decree should construe the contract, and that then we should take hold of this whole property. How long are we going to manage it?

Mr. Golden: That would depend entirely, your Honor, on contingencies. That is, taking charge of the system, and collecting the amounts due under these contracts, and then have these parties who hold contracts come in and ask for like relief, or who are not in position to receive water from the system, because of the insufficiency of the supply, then your Honor, having the parties before you at the time, and having taken over the project, can decree and determine what damages, if any, they have suffered, for which they should be reimbursed, and when the reimbursement has been fully made then the receivership should end.

The Court: It may be well at this time, if there is some way of getting an interpretation of these contracts, to avoid going into the general question of the duty of water, and the best way of using it.

Mr. Longley: Of course, we want to suggest to the Court that if the defendants in this action are in a position now by offering the line of proof which will call upon the Court to make a new contract for the parties here, that is, call upon the Court, in the absence of any ambiguity in the contract, to say to us, notwithstanding the fact that you have made this

contract for the delivery of so much water, I will now take and receive evidence as to what the duty of water should be, and then fix the contract accordingly; that could be the only theory, as we view it, upon which the Court would be justified in receiving this evidence. Then we will want and feel privileged to have our request granted, that the price be likewise readjusted and adjudicated, and if we are only to receive what these gentlemen say we should have, we will want the Court to also tell us what we should pay for that which we are to receive, under this testimony.

The Court: I had in mind that that was possibly a contingency that you had anticipated. In other words, if it should turn out that the company agreed to deliver a certain amount of water, and now has capacity we will say to deliver only half that much, whether or not the relief to be granted would be along the line of scaling down the contract price to correspond with the amount of water which could be delivered. I do not look at all favorably upon the suggestion which has been made by counsel that the Court enter a decree here and then take charge of this property through a receiver to collect the moneys. It would strike me that that would be an extraordinary thing to do. As I understand these contracts, if the installments be paid when they are due under the contract, it will take years before the full amount could be collected in. The receiver, of course, would have no greater rights as against the contract holders than

the company has. In other words, he couldn't compel the farmers to anticipate a deferred payment. These run over a period of ten years, do they not, these payments?

Mr. Longley: If an interlocutory decree were entered first, fixing the rights of the complainants, we believe the result would be the same ultimately as the decree suggested by Mr. Golden, except as to the receivership.

The Court: I don't think, Mr. Hays, I quite appreciate the materiality of this testimony. You are now seeking to show what amount of water is reasonably necessary for the irrigation of land. Or, in other words, to show the duty of water.

Mr. Hays: In a way, yes.

Court: It has been conceded once or twice during the trial. I understood counsel to say yesterday once or twice that they didn't raise any question as to your right to install the rotation method of distributing water. Perhaps you didn't understand them, or they didn't make themselves clear, but you understand now.

Mr. Longley: That is correct, your Honor. That is fixed by the contract.

Mr. Hays: I do. At least I hope so. And I think I understand the Court. And now I hope I will be able to make the Court understand me. We will admit, for the present then, all hands, that the rotation system is the desirable system to use. Very well. It was made our duty to provide for that; it was pro-

vided for in this contract. Now, as quick as you establish a rotation system, what does that mean? Somebody must provide for the amount of water you put in the canals, and when it shall be put there, and the proposition here is when shall that water be put there. That is all there is to it. Our canals are built of a sufficient size to deliver the head they want.

The Court: They don't question that.

Mr. Hays: No, that is not questioned. Now, when shall we deliver that? What is the rotation system? What does it mean? How often shall we deliver that? As I now understand the controversy, what we were proposing to show by these witnesses was that the rotation system was desirable and necessary and the best plan, and that is admitted, and we have introduced testimony to show that the canals were of the proper size, and that is admitted. And now there remains the question as to when it shall be delivered. The rotation system means that it shall be delivered alternately, not continuously, and I propose to show there how that should be done. Now, as I view it, that should be done often enough to successfully and properly irrigate the crops. We should deliver that head of water, this one-hundredth or more, if we can, often enough to irrigate the crops. That is all there is to the rotation system, is to deliver it often enough to accommodate the crops and accomplish the result. That is what we propose to show. We have introduced testimony here to show that we have a certain amount of available water supply. Let us say for argument at the present time we have 100,000 acre

feet of water that we can deliver. We are to deliver that under a rotation system, as we all agree. Now, how shall we deliver it, how frequently, what shall the intervals be? And in that connection we will go further; we will show, for instance, what the normal acreage is in the different kind of crops on these irrigation projects. To illustrate, an irrigation project may be roughly divided into two parts, the part on which they raise alfalfa and other grasses, and the part on which they raise grain and other similar things, requiring a similar amount of irrigation. Now, half is of one kind and half is of another. That is about the way the ordinary farm runs, or that is about the way the ordinary project runs, and there has been quite a good deal of data in this State, and that is available, as to about how that is divided, and that shows it is divided about equally, perhaps a little less in alfalfa and grass. Then comes the question, when shall I begin to turn on the water? Well, that is, when the season in an ordinary year opens, when shall I begin? Now, what crops first require it? Now, let us say that the alfalfa first requires it. Then what crop next requires it, and about what time, on this project, and how many times am I going to turn it on to the alfalfa field, and how many times on to the wheat field. That is the thing that determines the method of rotation, at the time. That also will determine in the end whether we shall get a good crop, when our water supply will be exhausted, and how many acres can be successfully covered, because those are only dependent on each

other, and only in that sense is there any duty of water involved here. It is frequently said that grain requires two irrigations. For instance, with fall plowing you have to irrigate twice on your grain. Then you irrigate alfalfa how many times? Well, I will irrigate my alfalfa three or four times. Now, on the South Side Twin Falls tract a great many people irrigate three times, and some irrigate four, and there are other variations. Is this a proper practice and a good practice, and how shall this ditch be conducted so that this water supply shall be delivered to these people? That was one of the propositions of the so-called cross-bill here, to bring it before the Court, so that the Court might see just how we proposed to handle this water supply, and just how it might be handled so that these people could get a satisfactory water supply, and at the same time so that the interests of the people who had invested in this project might be conserved. We don't desire, upon our part, to impose a burden upon them that they can't meet. We don't desire to impose a burden in the way of irrigation that isn't practicable and can't be worked out, because we must get our money out of this project. No matter what we think about this, we have got to get our money out of this project, and we have got to get it out of the people that live on this project, and they got to have a method of irrigation that is reasonably successful if they are to get any reasonable returns from the farms, in order to pay it. Now, we want to show to this Court first how that can be done, just how these rotations should be man-

aged, and just how they result in the way of water delivery. For instance, we propose to prove by this witness that in the ordinary years the grain will be irrigated about a certain time, first, that it will be irrigated twice, or, in some season, perhaps three times; that it will be irrigated about a certain time the first time, and the second time the irrigation will come in at about another time. Then what kind of a head should a man have at that time? How much water should be turned through for that purpose, for the purpose of the use on grain, and what is a practical irrigation head. For instance, I might say, here, we will expect that you are able to irrigate four acres of land a day, with a head of a second foot of water, by irrigating for twenty-four hours. I might use that as an illustrative unit. Then, if he had that water for ten days, he could irrigate a forty-acre tract. If he had it for twenty-days, he could irrigate an eighty-acre tract. And we must show how we are going to do it and how this water supply is to be furnished to these people, how these rotations must be worked out, just how the thing must be practically done, and we are not going to ask this Court to do anything that isn't practical. We don't propose to do that. But we wish to show to this Court just how this thing can be done. We have our ideas about how far the water will go, and just exactly how it can be done, and without any hardship being worked upon any man who lives upon that tract. It is to illustrate to this Court just how it can be done that we are proposing to offer the evidence we have now. And

I might say, to illustrate, and this Court may see another feature of it—when the next Carey Act project was made, on the Oakley project, a certain duty of water was established there by contract, a duty of water delivered at the farm, of one and a half acre feet.

Mr. Longley: Assuming that the settlers there should contend that that amount of water is insufficient, and should invoke the aid of this Court, would it be your notion that the question of the duty of water could be raised under that contract, and evidence introduced which would give those settlers more water?

Mr. Hays: Which contract?

Mr. Longley: The Oakley contract.

Mr. Hays: You are counsel, I know, for the Oakley settlers, and already have some litigation on that subject, so you will pardon me for not answering that particular thing at this time, Mr. Longley. But I simply call the Court's attention to the fact that that duty of water was established there, established by contract. I am not going to ask this Court to establish any duty of water on the Salmon property or any system of rotation that isn't right or that doesn't work out, but we do propose to ask this Court to give us an opportunity to establish a rotation system whereby that water can be used successfully upon such area as it is used. That is the purpose and object, just simply to show what rotation should take place.

Mr. Haga: If the Court please—

The Court: I will hear you after lunch, Mr. Haga. I was going to say, General Hays, that seems to be the real difficulty. The plaintiffs come here contending that they want a certain amount of water. They admit that you may deliver that water to them in bunches, so to speak, or you may deliver it continuously; in other words, you may bunch it together and deliver it for certain periods of the irrigation season, or you may deliver it continuously as may be best. Now, your contention assumes that you made no such contracts. You assume that you made no contract to deliver any specific amount of water.

Mr. Hays: Yes, a certain head, but not a certain number of acres.

The Court: But no specific amount of water?

Mr. Hays: No, a certain head.

The Court: So, after all, it comes to be a question of the meaning of the contract, and if plaintiffs are right in their construction of the contract that you deliver a certain amount, then this testimony as to the duty of water and method of delivery is immaterial. I understand this to be the view of the plaintiffs as to the meaning of the contract. It gives them water equivalent to a continuous flow of one-half inch per acre, and further provides that rules and regulations may be made for the best application or use of this water, and that ultimately, when the canal falls into the hands and under the management of the farmers themselves, they might very well conclude that the rotation method would be best, and then adopt that method and enforce it upon all water

users, but that the minority would not have a right to make the claim of rotation as against the will of the majority. It is the plaintiffs' idea that as a technical legal right they can demand that water be put in the canal on the first day of May, as provided in the contract. But if water is not put in, and it is not needed, they would have no remedy. Strictly speaking, as a matter of legal right, they contend that the terms of the contract must be complied with, and that water must be turned in on the first day of May.

Mr. Golden: We contend that we are entitled to water at the rate of one-half inch flow of water per acre, continuous flow, from the first of April to the first of November, or, if delivered by periods, as the crops need it, its equivalent during the irrigation season. We do not contend that we are entitled to possession or use of water when we don't need it.

Mr. Hays: If that is admitted, then the whole question of the duty of water is open, must be.

The Court: It may be that the duty of water is greater this year than it will be next year, or vice versa. But can the Court relieve you of the obligations of the contract, provided they are obligations, merely because the Court may conclude they do not need all of the water which they bought?

Mr. Hays: I called the Court's attention to a great number of decisions of the Supreme Court of Idaho establishing the policy of the law, that no man can have water when he doesn't need it.

The Court: That question doesn't arise. It is a question of the construction of the contract, and I am assuming all the time that the plaintiffs' construction is correct.

Mr. Haga: In order to come to any determination of any practical value to any party to this litigation, it is necessary to go into the question of the duty of water. Although the contract refers to some specific amount, nevertheless the fact remains that under the laws of this State, both the statutes and the constitution, the parties can not agree to any specific amount of water which amount is more than required for use. The public or the State, or the people of the State, are a party to each water right suit, because under the constitution of this State the water is the property of the public, and the right to "the use of all water now appropriated, or that may hereafter be appropriated for private use * * * is hereby declared to be a public use and subject to the regulation and control of the State in the manner described by law." The most that these water users can do is to agree with the company that it will construct certain works and undertake to deliver under certain heads the water to these individuals as they may need it. They have no right to parcel out among themselves the public water of the State, except such as can be applied to a beneficial use.

Mr. Hays: May the Court please, the Court suggested a line of questioning that might be followed. At that time the Court indicated it. I did not grasp it fully. I was thinking of it at noon, and I am not

just certain what that line was now. But, as Mr. Haga has indicated, we have been anxious to arrive at some solution of our problem, and for that reason we haven't raised objections to this form of complaint. I have talked it over with counsel to some extent. Mr. Longley didn't bring this suit originally. It wasn't brought upon any particular theory he had. It was brought before he was counsel in the case. And that we might arrive at some solution of this problem, we put in that cross-bill, because we thought possibly that would raise the issue in such a way that it might aid the Court to aid us in the determination of the difficulties which we have encountered. The project originally was 73,000 acres. By various circumstances it has been cut down to 57,500 acres, in effect. These people who have entered this land and haven't proven up, they have not settled there, they have not made their annual proof, and they haven't come back at all. Under the statute the State Land Board cannot grant them an extension. That has been decided in the Loveland case. They did grant them, it is true, an extension of a year at one time. That time is up now. And we have thought, and have suggested to counsel on the other side, that the only way for us to get together is to both go before the Land Board and agree that these be, for the present at least, cancelled. If the water supply should ultimately turn out as good as we think it is, then nobody will be hurt. Cut it down fifty thousand acres, and then, in addition to that, there is only in cultivation thirty thousand acres. The ordinary growth of these projects is somewhat slow.

I will use an illustration perhaps outside of the record. The South Side Twin Falls project, many years in cultivation, 200,000 acres sold, and only 160,000 acres cultivated. So that in the course of time this thing would go on, and we could arrive at the point, and we will do our best for the present to hold things as they are and then arrive at some conclusion. Now, I have one or two things to suggest to the Court, to see if I can be of some help or aid in arriving at a proper conclusion. The theory upon which the complaint on the other side is brought is that the first men there, the early settlers, obtained a right, and that some other people later on may be eliminated. In other words, there is in their complaint the idea of priority; that is, the first come, the first served; that these people are prior. Now, when I spoke of a proportionate right, to which my friends have alluded a time or two, it wasn't altogether by any means with regard to the water right, because that question of proportionate right has an important bearing upon the relations of these parties to each other, and particularly upon the relation of these parties in view of the kind of complaint. Let us see what the result is if we seek to cut down this project in the way that they suggest. Section 1615 of the Revised Codes provides that the proposal shall state the source of water supply, the location and dimensions of the proposed works, the estimated cost thereof, the price and terms per acre at which perpetual water rights will be sold to settlers on the land to be reclaimed, said perpetual right to embrace a propor-

tionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto. The settlers' contract itself said that this certificate also entitles the owner to a proportionate interest in the dam, canal, water rights, and all other rights and franchises of the company. Then on page six it was said as follows: 'Priority of application or priority of entry or settlement shall not give any priority of right to the use of water flowing through the canal against subsequent purchasers, but shall entitle the purchaser to a proportionate interest only therein.' Then again it is mentioned a little later on in the contract, on page seven: "Each share or water right sold or contracted to be sold as herein provided shall also represent a proportionate interest in said canal and irrigation works together with all rights and franchises therein based upon the number of shares finally sold in said canal." Then again the same thing is mentioned in paragraph ten of the contract, which says: "And a proportionate interest in the said canal and irrigation works based upon the number of shares ultimately sold therein." The words "rights and franchises" was held in the West case to mean water right. The contract in that case was not quite so specific as it is here, which specifically mentions water right. This contract provides that there shall be no priority. If they have acquired a proportionate interest in these works, then there can be no cutting off of the subsequent entrymen of the men who came last, and there couldn't any such result come about. If there was

to be a reduction under this contract, that reduction must necessarily come about by a pro rata cut-off of acreage, that is, each man under this tract would have so much cut-off; it seems to me that that would be the inevitable result, that there can be no other manner of scaling down the acreage, that it would necessarily that on account of these provisions of the statute and the contract. So that if anything like that is to be done, then that would be the way it would have to be done.

Now, there is another problem here, and that is connected with the patent. We perhaps can acquire no lien upon property to which we have not both a sufficient supply of water to reclaim it from its desert character—if we haven't enough water to reclaim this land, then we can't get a patent for it, and these settlers will fail. The settlers can't get title to the land except they get patent from the Government, and except they have sufficient water to reclaim it from its arid character; that is, they can't get title to the land on the basis that there is water enough to reclaim it and not pay for it. On the other hand, this matter of a patent also bears upon the question of the proportionate right. If these people are to have this cut down, then it must be cut down proportionately, and they will only get patent for part of their land; they can't get patent for all of it; they will just get patent for a part of it, and a proportionate part will be cut off. We will have our lien for the full contract price upon the remaining land. We wouldn't have a lien upon all the acreage, but we

would have a lien upon the remaining land for the full contract price. But on the other hand, the settler can't get that other land, because we haven't furnished him the water. If we do furnish water for it, then we must be paid for it. So that there is that question in any cutting down of acreage, how is it to be done, and how does it affect this matter of patent. There are many important questions outside of this matter simply of the distribution of the water supply. That question of proportionate rights stands in that way. Perhaps I may illustrate the situation to some extent; here is another problem. Let us admit for the present that there isn't to be water for more than half that land this year, that is, half of the existing acreage that was in cultivation last year; then how is the water going to be distributed? We are there; we haven't got patent to it. The works haven't been turned over to the operating company. We wish to do that, and the operating company sort of took charge, but it hasn't been legally turned over; what is going to be done, then? Well, those people then will want to distribute that water, the ones who were there first will want it all, of course; they will want it on the basis of a continuous flow, and the man who settled there a little later will think that a proportionate interest this year will be a great thing for him; a proportionate interest, he will think, this year is a safeguard; whereas their theory wouldn't keep anybody's crops alive. He will think it is all right this year. As between themselves it will be fine, but as against the company it will be a different thing.

Mr. Longley: You have reached the point in your argument where you assume that you have but half enough water. Assume for the moment that you have no water at all, then how would the testimony which you propose to introduce here, as to beneficial use of water, enter into the question of your rights under this contract?

Mr. Hays: I will get to that point a little bit later. This year when the water supply is short the settlers will be perfectly willing to have the system of rotation used. It is difficult on the part of the company to deal with these problems, because there are so many settlers, each having his own views. Sometimes they follow the advice of counsel, sometimes they do not. The segregation was cut down 37,000 acres before the land was opened for settlement. Then about 10,000 acres more were cut off and now there are only 57,000 acres on this project left with valid contracts. If these people can be served with a water supply adequate for their purpose, these 57,000 acres, then we certainly have a right to divert this water for that purpose, and either that acreage or such other acreage as it can be made to serve, we have our reasons for believing that it will serve a certain acreage, and that is what we wish to show, in order to aid the Court in finding some way out of this difficulty. The Court called attention to the fact that wherever people had contracts for one-hundredth of a second foot, and so forth, that water was always delivered to them. In the last few years a great change has come about, the water users under

a canal system taking a proportionate interest, that is, each one has the same right. Then the influence of the Reclamation Service has been very great upon that form of contract. The Reclamation Service provided that these works and their feasibility and the water supply, and everything, were to be determined by the Secretary of the Interior. Now, when you come to find out what water you are going to get upon a reclamation project, you have to look to their book of questions and answers relating to the operation—

Question: How much water will be furnished for the land? Answer: Such amount as may be available from the works controlled by the United States, and not to exceed the amount necessary for the proper irrigation of the land. Question: What assurance has he of a sufficient supply? Answer: The Water Users' Association is required to limit the land represented by those shares to the highest efficiency of the water.

We have been trying to operate this way under the Carey Act with more or less success. The Reclamation Act illustrates that the idea had already begun to prevail in the public mind whether the water right was sufficient for the entire project. They no longer bothered about having an inch to the acre, or anything like that. The only question was as to whether the water right was sufficient for the entire project, and also, what was to be the manner of distribution. Sec. 6 of that Act provides that beneficial use should be the measure of the right. When the

Reclamation Service comes to make these contracts, they don't make contracts for any specific amount. The Reclamation Act did not provide for the manner of distribution, leaving that to the states. It only provided for taking a water right in bulk for the whole project. The State statute does not provide that the settlers shall have so many inches of water, or require a contract to contain a provision to that effect. In the original form of the Carey Act contract, which the Court will find in the irrigation laws of 1899, as prepared by the State Engineer, it had all the provisions found in this one, but it had an additional provision, and that was that a person should get so many acre feet, but no such contract was ever agitated. There was substantial change made in the form of the contract and of the subsequent contracts that were made. The original form of the contract would have made all tenants in common. It provided for a deed to the system, a proportionate interest to the water, and a proportionate interest in the system, to be given under the old form of Government or community ditches. Bearing in mind some of the difficulties that had arisen under this form of contract when the first Twin Falls contract was made, it was provided that an operating company should be organized. The reason for that was that this other method of giving deeds wasn't satisfactory. It left the people in an unorganized condition. They couldn't do business. In the first form of contract that was made, and all subsequent ones that expression with regard to giving the con-

tract holders a certain number of acre feet was omitted, and the people at that time had an idea that they had taken up the water right for the entire project, and if they came to express a certain number of acre feet, that that might be a bad provision in the contract, and that that might interfere with the distribution. It had been found by experience in the Boise Valley that the amount of water required on any given piece of land was a variable quantity. Beneficial use is the measure of a right, so in other projects the question determined first was whether there was enough water for the entire project, and second, if there was, then to determine the method of distribution. So when it came to carry out the idea of distribution on the Twin Falls contract, reference to a specific amount of water was omitted, a provision simply being made for giving the contract holders a certain interest or proportionate interest in the company that was to operate the system. The form of contract that is made with the settler is presented to the Land Board and approved by them, so that the making of the settlers' contract was subsequent to the State contract. It was intended to be in conformity thereto. The only contract the settler actually received was this document, settlers' contract, Exhibit "C," which provides that the settler should receive one-hundredths of a cubic foot of water per acre per second of time, in accordance with the terms of the contract between the State of Idaho and the Twin Falls Salmon River Land & Water Company, and further, that he should be entitled to

a proportionate interest in the canal, dam, water rights, and all other rights and franchises of the Land & Water Company. Contract further provided that the Land & Water Company should retain control of the Salmon River Canal Company, and that the water should be measured to the users from the place of diversion in the main laterals of such irrigation system in such quantities and at such times as the condition of the crops and the weather may determine, but in accordance with such rules and regulations, based upon a system of distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from the canal system. The settlers' contract provides that he was to receive water in accordance with the terms of the contract and the contract said he was to receive it in the manner as stated.

Mr. Longley: That provision says that so long as the Land & Water Company shall remain in control. How is the settler entitled to receive it after it gets out of its control?

Mr. Hays: The contract provided that the Land & Water Company should prepare and put in condition a physical system of distribution, and that the settlers should fall heir to it. In the earlier contracts there had been a provision that has made it obligatory upon the company to install a system of rotation as provided in the contracts. For instance, the South Side contract had such a provision, and the company found that they had better not do it. That it was easier to do something else, and less ex-

pensive, and occasioned no litigation. Don't try to install any system; that was so much easier, that no company wanted to undertake that afterwards, and so this change was put there: "It is agreed that said system of distribution by rotation shall be devised by the party of the second part, and used by the Salmon River Canal Company, Limited, in case the necessity arises during the period while it retains the management of the Salmon River Canal Company, Limited." In other words, the Company didn't want to have it obligatory upon them, because somebody might afterwards find a cause of action against them because they hadn't done that, so in this form of contract that earlier form was modified.

Now, as to the one-hundredth, they believed it was necessary to prescribe the amount of water that a man might receive at one time, and this is governed in this contract. The capacity of the canal fixes the head that a man can receive. In this case it was found desirable to build extra capacity so as to better the service. In the very first argument when we took up this case I said that if there is a criticism about this contract, it is about that one-hundredth, because that should be, in my judgment, a more ample provision, and it was built with a more ample provision. Ditches couldn't be built on the basis of allowing a man to wait until long after the time when he should begin using the water, coming in and demanding all of his water at one time. As we view this contract the settler is entitled to his one-hundredth or more delivered to him in accordance with

the terms of the contract, which terms provide that the water shall be received and measured to the users at the place of diversion at the main laterals, and in such quantities and at such times as the crop, etc., may determine. There is another point: The contract provides: "From the point of diversion in the main lateral." It doesn't say at the half-mile point, or any other point. We were bound to build our works to the half-mile point, but the water was to be measured from the point of diversion from the main lateral. When this contract was made it was the idea under other projects that the lateral should go into the hands of the people under it, and that they would run it themselves. Rotation grows up on laterals because you can't put into the very end of the lateral the water that the user is there entitled to, without perhaps undue waste, so that all of the people who have any rotation are the people who rotate beyond these laterals. No matter what may be the ultimate view of the Court as to the construction of the contract, we would of necessity have to have this testimony so as to make a record, and so perhaps as to get the whole situation before the Court, in order that the matter might be determined in some way, or that the Court might see whether it might be determined in some way. There is an Idaho case upon the question of the right of one man to more water than he needs, which is somewhat instructive: "The theory of the law is that the public waters of this State shall be subject to the highest and greatest duty. The fact that a water user and consumer has

a rental right for a fixed number of inches of water does not of itself entitle him to that number of inches of water, unless he can and will apply it to a beneficial use." When he ceases to apply it, it is then available for another user and consumer. Practically that is the rotation system in practice, and even where a user has a right and has bought that many inches, he doesn't get it unless he needs it. He can't make a contract for a larger amount than is necessary. It was agreed and stipulated by the contract that we shouldn't oversell our water supply, and it wasn't the purpose of the company to so oversell, and they thought all these things had been determined beforehand adequately, and in ordinary cases where those things are determined by the representative of the State, it is final. But whatever the law is, that isn't practical for us, because we must get our money from these people and must have a lien upon the lands to which we furnish water, and we must get a patent to this land. They can't get title any better than we can get patent. We are all somewhat in the same situation, and, therefore, we must work out some method whereby every man who is there shall get title to his land for the full acreage, and if there is water enough to irrigate the remaining 57,000 acres, let us introduce our evidence, or let us wait and demonstrate it from a practical standpoint and see what we can do. If it is shown there isn't that many acres, then they will have to devise some plan—and they can't devise it without the aid of the settlers, very well—whereby they can get rid of the surplus

acreage. I can't see any plan that could be worked out under any other method that would get the settlers anywhere, or get us anywhere, and preserve the project in a reasonable way. Perhaps the other side will say: "We will keep our land, but you haven't given us as much water as you are going to, and therefore we will cut your price down." There is one difficulty about that. They can't keep their land and do that. They can only get a patent for what land they can water, and therefore, they can't get any title to it, and we can't get any lien upon it, and if there is any cut in that way it has to come in proportionate amounts off of each man's land. A cut in price would amount to practically the same thing as a cut in acreage, from the point of view of dollars and cents, but there is this difficulty about it, that it presents an impossibility in the way of carrying it out under the Carey Act, as we view it.

Let us put the question in this way. We are trying to show what amount of water is needed, and they are claiming the amount that is fixed by contract, so they come to us and say: "The contract is good enough for us, we are entitled to the amount fixed therein, although it is too much, and you can't take it away from us." And further, they say: "It isn't enough to go around on that basis, and therefore the Land & Water Company are not to have a lien upon as much land." Then we would come back and say: "That would be all right if you were hurt, but you are not hurt, you can't complain, if there is water

enough to irrigate your lands under reasonable terms and conditions." They can't come into court seeking relief where they are not injured any way, because they wouldn't be harmed if they got water enough.

Mr. Longley: The third paragraph of the settlers' contract states that: "The consideration for the water rights hereby agreed to be conveyed is the sum of Sixteen Hundred Dollars." Now assuming that you have sold the water contracts in excess of the water supply, and an action were predicated upon those facts, would the Land & Water Company be required to afford any relief as to the reduction of price or as to the cancellation of the excess water right, or must the matter stand as you have bought it?

Mr. Hays: Our answer to that would be if you have really got water enough to irrigate your land, are you hurt? And should we cut down the acreage, as you seek to do here, if you are going to get water enough? We were directing our testimony along this line. Your certificate said that you would have one-hundredth of an inch, in the manner and form and way provided in the contract. We now propose to show what is reasonable under this, and how it should be done. This, in itself, doesn't prescribe the rules and regulations as to how it should be done. That is a matter that may vary from year to year. For instance, in years of great drought, as this year, it would require a different method of distribution to that used in years of a plentiful water supply. We are not attempting to present any testimony with the

view of giving to the Salmon River settlers any water supply that is insufficient, but it is our idea to show just what is needed and how the distribution should be held and what result will follow from it.

Mr. Longley: May it please the Court, candidly I confess my inability to attempt to reply to the argument of counsel, but I do wish to make a statement at least of what relief we desire, attempting to answer in part the suggestion of the Court this morning. We seem to be confronted by this situation: Obviously there has been a sale of water rights in excess of the available supply. Now, to justify it, or rather, the defendant, Land & Water Company, to justify their position under this contract, say that we are not entitled as a matter of right to the water sold, but we shall have a proportionate interest in whatever supply may be available. We in turn then say: "We will not pay if we are not entitled to receive what we bought, and not paying, not attempting to secure patent, not attempting to prove a lien upon these lands of the water right as provided by the State statute, we are of the opinion that the Land & Water Company, or its assignees, will be unable to secure a foreclosure, and there the matter stands. Because of that fact we are in this position, and we want relief some along this line: We want this Court to tell us, if it will, what our rights are, precisely what our rights are under this contract, insofar as the correct interpretation of the contract is concerned. In other words, we want the Court to say to us: "You bought a water right of a certain amount," if the contract is susceptible of that interpretation.

Then also say to us, "And for that water right you must pay, either to an officer of this Court or to some one who will hold the matter in statu quo until the fact can be determined as to just what you will receive, that is, that you will receive the thing you are expecting to receive, upon payment of the amount due." We want to make these payments; we want to get our patent; we want to go ahead and develop our tract. The settlers are the last men to hold back and prevent the development. And the development has been prevented by the continued refusal of the company to recognize the one thing which we say they bought, and which they say we are expected to pay for, and that is a water right. And so I suggest to this Court that, following the wording of this contract, that if we are entitled to a water right of four and sixteen-hundredths acre feet, and this Court tells the complainant in his action that they are entitled to such a right, for which they must pay the amount stipulated in the contract, the beginning of the solution at least is here. Now, I will make a further suggestion. It is rather in the nature of a prophesy, perhaps, but the moment the amount of water is determined by the Court to which we may be entitled, and the moment the Court tells us that those who receive that water shall pay for it, the situation will adjust itself, in my opinion.

Mr. Hays: Mr. Longley, upon what basis do you want that supply determined—upon the basis of what you find the run-off will be this year, or—

Mr. Longley: No, indeed.

Mr. Golden: Upon the basis of your sale of it, General.

Mr. Longley: I want the availability of the water supply and the water supply determined, as you can determine anything, it can only be approximated at best. We are claiming that the measurements for the various years should be averaged and determined in that way, and then we be given precisely what we bought under the terms of this contract. While there is a variation, yet the Court can determine the general average, and then if the settlers are inclined to save, they can certainly guard against a short year of this kind. In other words, they are entitled to the benefit of that very situation, rather than the construction company, because of the contract, and we are here under the terms of this contract. It occurs to me that it would be a novel proposition for the settler, there would be a great many things that he couldn't possibly understand in this contract, and we are not going outside of the record when we say that this contract was not prepared by him or with his understanding, but was prepared by someone, and entered into by the State, and the settlers' contract was submitted to the State's authorities, and was there passed upon. And right in that connection, if the State had at that time any complaint to make on the amount of water sold to us under this contract, it was the time to speak then, and not now. In other words, the law requires the investigation by the State Engineer as to the proposed plans, and each step involved, the necessities of the soil, the amount of

water, and we must assume that it was passed upon by the State Engineer, and the State Land Board is given the right to pass upon these questions. Now, there are a great many things in this contract which the settler couldn't possibly understand, but here is one sentence that he could understand and must appreciate: "The consideration for the water right hereby agreed to be conveyed is the sum of Sixteen Hundred Dollars." Now, he agrees to pay that, and having understood that much of the contract, then to be brought into Court for an interpretation of this Court, and then see experts go upon the stand to determine the duty of water, the beneficial use of water, subsequent to the time of his entering into the contract, and materially changing the obligation of the contract and the contract itself, I say that in a situation of this kind, if we are expected to pay, we ought to be entitled to receive what we pay for. If there was a mistake in entering into the contract in the first instance, that mistake can not be brought home to the settler, who will suffer, under the theory advanced by the counsel, that he must take a proportionate interest in what may be there available, because that may mean something or not. It is just the substance and the shadow. He pays for the shadow, having contracted for the substance. Because these men come in and testify under this question that he doesn't need the substance, but something well along toward the shadow. The construction of the contract, while the relief is not clear to my mind, and never has been, there certainly has

been a breach of this contract, for which we are entitled to some relief, and it seems to me that an interlocutory order or decree along the lines suggested, that the amount of water be determined, the available amount, that the rights of the settlers under this contract be determined in acre feet or second feet, or in some way, or at least the contract interpreted, and then we be required to pay our money and proceed with the development of this tract.

Mr. Hays: Mr. Longley, do you people have any objection to the State Land Board following the law and proceeding in accordance with their rules and regulations, which they have, to cancel that sixteen thousand acres on which nobody has settled?

Mr. Longley: I don't know why you should ask us if we have any objection to the State Land Board following the law. It is their duty.

Mr. Hays: We haven't been able to do it, as we understand, on account of your objection.

Mr. Longley: We object to the turning over of this system as complete with no water in the system for operation. That is the objection made, and the only objection.

Mr. Hays: You have no objection then to the other?

Mr. Longley: Not in the least. They can follow the law so far as the settlers are concerned, I am sure.

Mr. Hays: There are some thirty thousand acres in cultivation, and some fifty thousand acres for

which water right contracts now exist, so that that would represent the difference now between us. Those owners of 37,000 acres of water contracts, that is, people who have cultivated that 37,000 acres of land, own 45,000 acres. The remaining 10,000 acres is Carey Act land, proved up on, for which they have patent, but which they haven't cultivated. Does that situation offer any practical way of arriving at a conclusion?

Mr. Longley: It always has to me, but I don't see that it is a proper matter for consideration by this Court, unless there is a formal request for it.

The Court: It is certainly an extraordinary case where both sides want relief and neither knows what it wants. I assume that counsel for the defendant are prepared to go into this matter of the duty of water, but would like to ask whether both sides are so prepared. I am disinclined to take the view that it is a material issue at the present time, so far as the primary question is concerned, but if witnesses have been subpoenaed here at a considerable expense, I was going to suggest that perhaps the testimony might be taken somewhat in the nature of depositions. We could probably get through with it in a day or two, and then if it should ultimately become material in any view of the case, the record would be ready for use. My present impression is that primarily this is a question of the construction of this contract, and that this testimony would not assist us in construing it. Do you have any objection to proceeding in that way, Mr. Longley, that is, to having

this testimony taken, to be regarded as provisional evidence?

Mr. Longley: I will say, your Honor, that our witnesses, with the exception of perhaps two, have all returned to their homes, and it occurs to me now that we would be obliged, if we go into this matter on the suggestion of the Court, to recall not only the witnesses here at the opening of the trial, but such additional witnesses as we could afford to bring here, or whose testimony should be taken in Twin Falls, to pass upon the value, testify rather, as to the value of a water right, assuming that it should be reduced to a point as indicated by the experts. And so, for our purpose, while I should like to have the full and complete record made, for our purpose it is quite necessary that the Court should rule upon the question, if possible, and require us to do one thing or the other.

The Court: I am rather inclined to permit the testimony to be taken and it will be deemed simply as depositions, however, not to be considered part of the record at present. If the question becomes material, you can introduce the testimony taken, and also take further testimony. It is an unusual case and I am very much in doubt whether I can enter a decree by simply construing the contract. That seems to be about all that counsel for plaintiffs have in mind. Can a suit be maintained merely for the purpose of construing a contract, without granting any relief?

Mr. Golden: Adjudicating the right.

The Court: But adjudicating the right means granting relief. If I construe the contract, that would be the theory upon which the decree would be entered, but what would it require the defendant to do, or to refrain from doing?

Mr. Golden: It would quiet title in the plaintiffs, to the amount of the water right.

The Court: I cannot quiet title to a water right in which a large number of persons are interested without having them before the Court.

Mr. Golden: As between the complainant, the vendor and the vendee, the adjudication would hold, without the appearance of any other party to it, because while indirectly it may affect the other parties, yet as between the contracting parties it would settle their differences and rights, if any.

The Court: What would be the purpose of all this evidence about the amount of water supply then, if it was merely to construe the contract?

Mr. Golden: For the sole purpose of showing to the Court that this company is unable to carry out all of its contracts, and for that reason, and because of its insolvency, that the Court take charge of this contract. That was the purpose, your Honor, and when we eliminate that, if the Court is disinclined to take charge—that was the sole purpose, and no other, because that is one of the principal reliefs asked for after the adjudication of these rights.

The Court: You don't allege that they are mis-

managing the property? The property is being well managed at this time?

Mr. Golden: It has sold and disposed of water.

The Court: Yes, but it is not doing so now. If you had asked that it be enjoined from entering into further contracts, that would be clear and definite.

Mr. Golden: We have asked for that relief, your Honor.

The Court: The defendants seem to be very willing not to sell any more. If that were all we could enter a decree at once, by consent.

Mr. Golden: Yes, if the other right is determined at the same time.

The Court: I think I will let them take their testimony upon this point for future possible use. I will say I am unable to see how it is going to become material. It certainly does not assist in construing the contract. If you wish to take it in my presence I will sit, and permit you to do so, but it is not to be used until you show for what purpose it is taken. Neither counsel have indicated what relief this testimony is germane to. Supposing I should conclude that half the amount of water designated in the certificate is sufficient, then what relief are you going to base upon this testimony, assuming it is favorable to you?

Mr. Haga: In the nature of a defense to any relief that they may ask.

Mr. Hays: If the Court please, we will not recall Mr. Wayman, but will take the testimony of

other witnesses who have come from a long distance, and we will be done when we are through with that, and will be ready to close. The rest of the depositions we will take on Monday. Perhaps in the meantime we may be able to get it closed down to a very brief form.

Mr. Longley: We ask in our prayer, among other things, that this contract, the settlers' contracts, and the State contract, be specifically enforced as to the defendants in this action. Now, the proof offered in addition to the contracts amounts, as we believe, to a showing that the defendant company, both the Land & Water Company and the Canal Company, being in the control of the Land & Water Company, have refused to give us the performance to which we are entitled under the terms of our contract. In other words, they have failed to supply us with the water we purchased. And as a consequence we ask that they be compelled to do so. I desire to call your Honor's attention to a case decided by the Supreme Court of this State within the past year, and reported in the 141 Pacific, at page 77, being the Childs-Neitzel case. That was an action brought by certain water contract holders, or rather in which certain contract holders intervened, for the purpose of compelling, among other things, the specific performance of their contract, alleging, and the evidence tending to prove, that the company had failed and refused, as in this case, to give them the water right they were entitled to under their contract, asking that a receiver be appointed, and that the receiver

collect the amounts due upon these contracts, for the purpose of so completing the system, or at least of giving the intervenors, the water contract holders, the relief to which they were entitled under the contract, the specific performance of their contract. And without reading the opinion in full, I desire to read a certain paragraph of the opinion filed on rehearing, which perhaps has some application to the matter here before the Court. Counsel for appellant contend that the Court erred in directing the specific performance of the contract for the completion of the system. Now, while there is no claim here that the system has not been completed, perhaps, we do claim that the object and result to be attained by the completion of the system has not been brought about or given to us, that is, the furnishing and supplying of the water right, and that was the situation in the Childs-Neitzel case. It was upon completion of the system that the water right was to be secured for which these persons were expected to pay.

“This objection is predicated upon the general rule that contracts for erecting buildings or doing construction work will not be enforced specifically by a Court of equity. The reason for that general rule is that the enforcement of such contracts would cause the Courts great inconvenience, but there is no question but that Courts of equity have jurisdiction to require the specific performance of such contracts if they conclude it is necessary to do so in order to protect the rights of the parties. If a Court of equity is without authority to specifically enforce contracts

in question, the water users would have no remedy by which they could protect their rights. There would exist a wrong without a remedy, and that is contrary to the well recognized maxim that equity will not suffer wrong to be without a remedy."

The wrong in this case is obvious. They have sold water rights in excess of the supply, in other words, have violated the terms of the contract with the State. And we say that it was incumbent upon them in the first instance to know the available water supply, and contract accordingly. In any event, they agreed not to do the very thing they have done, as the evidence will disclose in this cause. Here is the situation which confronts us: "It would be a grievous wrong to the owners of contracts for water rights to be compelled to pay for such rights and have no remedy whatever to compel the contracting party to furnish them water." That is the situation we find ourselves in, and we want to make those payments, as heretofore suggested. That they are attempting to require us to pay is evident by the fact of at least two foreclosures in this Court, brought for the purpose of foreclosing what they claim to be a lien upon the water rights or land involved in this action, and yet in view of the proof here we are confronted with the difficulty apparently of finding some remedy for that obvious wrong. It seems to me that the Court can, within its jurisdiction and equitable powers, make an order here which will give to these complainants and all others who may be entitled to receive the relief, the specific water rights which

they bought and are expected to pay for. Now, the Court may say to us that it declines to enter an order here, for the reason that the power of the Court in that respect is not clear. Nevertheless, the demand has been made this spring upon these water contract holders to pay. And there is another thing in that respect which should be brought to the attention of the Court. The contract itself provides that no water shall be delivered or distributed to the contract holders as long as there is any deferred payment due, any delinquent payment, and, that being true, we are placed in the position of having to pay right along in order to secure any water, and yet we are paying for something, because of the terms and conditions of the contract, which confessedly we can't get. And for that reason I say that it would seem that, assuming the facts to be true, which I have urged, we would be entitled to the relief suggested. In other words, the statement of this Court, the decree or order of this Court, that the contract, insofar as the complainants are concerned, and for all others similarly situated—and in that connection we have brought this bill for and on behalf of all contract holders—their rights up to a certain point at least are identical in interest—that such contract holders be and shall be entitled to receive the specific amount of water nominated in this water contract, and then shall pay to the officer of this Court, not outside of the jurisdiction of the Court, but keep the fund in this Court until this system is completed, in other words, this contract is performed. This is

the situation we find ourselves in. There is a manifest wrong, and it is to be continued, and the claimed rights of the assignee here are being asserted every day, and yet we seem unable for certain reasons to get the relief which should be an absolute protection as against paying for anything we can't get.

The Court: Isn't there a distinction between these cases, Mr. Longley? Assuming all you claim to be true, both as to the facts and the law—I did not intend to question the power of the Court specifically to enforce a contract of this general character; that wasn't the difficulty in my mind; but in the Childs-Neitzel case, as I understand, the Court simply held that the Court would see that the contract was carried out, by completing the system, but the company here apparently has now done all that it can do. The Court, of course, can't compel the defendant to do an impossible thing. If the water isn't available, if the water is not there, and that is the deficiency of the system according to your view, not that the dam has been improperly or insufficiently constructed, or that the system is incomplete—that, as I understand, that the work has been done. The water supply, however, is insufficient, as you contend, and that I understand is substantially your only contention. You do not contend that the system is being mismanaged, or that you are being discriminated against. You are simply contending that the company has not a sufficient water supply to meet its contracts. Now, assuming that the water supply is insufficient, assuming that the contract should be

construed according to your contention, then what can the Court do? The Court can't require the defendant company to create water, it can't do that; it could compel it to build another lateral; it could compel it to raise the dam to a higher point; it could compel it to enlarge the main canal, and it could compel it to cut out this catch basin, as it is called, possibly. It could compel it to do anything that is practicable, or that is within the range of reasonable possibility, but how could it compel it to supplement the water supply which it has, and which you contend is insufficient?

Mr. Longley: I am making no contention of that kind.

The Court: Suppose the Court, through its officers, should collect the moneys that are due, or would, according to the terms of these contracts, become due from time to time, what could it do?

Mr. Longley: The Court in this case could compel the defendants to refrain from attempting to enforce these water contracts until they have performed, and furnished the water supply to which we say we are entitled, and we ask in this case that this trust deed, insofar as it may be in excess of the water supply available, be cancelled, and that these defendants be enjoined from enforcing or attempting to enforce, or collecting or attempting to collect, the water payments due, until they give us what we have bought.

The Court: But suppose they never can do that?

Would you contend that they couldn't claim anything against you?

Mr. Longley: No, your Honor.

The Court: Then, how are we to determine that question?

Mr. Longley: Then I would say that for what they have furnished we should be compelled to pay. In other words, that there are certain lands here now, which can be cultivated each year, and receive substantially the water here contracted for, 30,000 acres.

The Court: That is the very question that arose preliminarily. How can I require the company, in the face of the provisions of your contract, to furnish all the water to certain contract holders and withhold it from others, especially when they are not parties to the suit?

Mr. Longley: The Court could require the company to do this: There are enough payments in default upon this water contract that it is within the power of the company now to cancel these water contracts. They should in any event, because having sold and issued contracts in excess of the amount of water supply, in other words, having violated the terms of the statute, they should bring themselves within the rights given them by the law.

The Court: Supposing I had John Jones here, who holds a contract. Now, upon what theory could I require him to give up his contract?

Mr. Longley: On this theory, your Honor: John Jones, while he may have made an entry upon the land, has never applied the water that he was entitled to to a beneficial use. Now, illustrating what I mean, I will take tract. At the present time there are practically 30,000 acres under cultivation, we will say, represented by 400 settlers upon the tract. Those settlers have been diligent in the eye of the law, because they have gone upon the land, they have made the settlement and the reclamation which the law requires, and they have applied the water to a beneficial use. John Jones has never gone upon the land, unless perfunctorily, and made some slight application of water to the land, simply for the purpose of preserving his rights under the law. Now then, here is a situation where he have 73,000 acres sold and 30,000 in cultivation, owned by settlers who have gone upon the tract and have been diligent, and who have applied all of the available water to the land, giving to each the amount of water he is entitled to under his contract, assuming that there is such an amount available. While it says in these contracts that there shall be no priority, a somewhat similar case was passed upon from Elmore County, in which the Court said that even though the contracts are issued, one beginning this morning and several today, and several tomorrow, and the day after, that the right of the contract holder is not determined by the priority of his contract with the construction company or irrigation company, but rather determined by his settlement upon the land, and the application

of the water to a beneficial use. Now then, as between John Jones and the 30,000 acres brought under cultivation, and upon which this water has been applied, if one of the two of those innocent parties must suffer under this contract, which one would it be in a court of equity? And I say, that being the situation, assuming that there was sufficient water for the 30,000 acres, and some one, in order to specifically enforce this contract, must suffer, then I say John Jones must fall, and his contract with him.

The Court: Of course there is much to be said in favor of that view, if the necessity arises, but here would be another question. Here is this long lateral that is spoken of, that provides water for the extreme western section. Now, suppose it should turn out that upon that tract there were comparatively few settlers who have brought their land under cultivation, and they are scattered, one on this lateral and one on another, for the Court to require them to furnish them water would mean a very great relative waste of water. I don't mean waste in the strict sense, but it would mean the requirement of a large volume of water to meet the comparatively small need. The efficiency of the water would be very low. There would be that consideration again as to whether or not the Court should require a large stream of water to be diverted for the use of a few settlers. That would be against public policy.

Mr. Longley: Perhaps so, and yet I don't know who could complain, certainly not the construction

company, because of the waste of water, because the situation is of their own making.

The Court: Suppose there isn't water enough for even all of the cultivated lands, then what?

Mr. Longley: Then, in my opinion, as between the persons who have applied the water, the doctrine of priority would determine absolutely their rights in the last analysis.

The Court: That couldn't be done without having the parties before me. I suggested at the preliminary hearing that if that relief should be asked for you should bring in the other parties, and you decided not to bring them in.

Mr. Longley: We attempted to find some way of bringing those parties in, but when we determined the cost of so doing, I am frank to say to the Court that we couldn't meet the expense entailed.

The Court: Suppose I were to order them brought in, who would pay the expense?

Mr. Longley: I am at a loss to answer that question, unless the trust fund which we ask for in the prayer would be used for that purpose. But here we have a situation which is manifestly wrong, and yet we seem, for the reasons suggested by the Court, to be without a remedy.

The Court: It isn't necessarily that you are without a remedy. It is a question whether I can grant any relief in the action.

Mr. Hays: Mr. Longley, would you be willing in this case to stipulate with us that the Court might

determine the duty of water, and that we adjust all other features of this controversy, what is right and fair for you people to have, and how?

Mr. Longley: I will not. I will stipulate that the contract shall fix the duty of water, and that the Court shall determine who shall be entitled to it.

The Court: This is clear, gentlemen. In the suggestion now made by Mr. Longley you are asking me in a sense to abrogate and rescind certain contract, and you are simply asking me to rescind these contracts for the benefit of certain other contract holders, on the theory that one class of settlers has shown more diligence than the other. If the Court has that power, the ultimate purpose should be to handle the whole situation, so as to do the least possible damage, the least possible injury, and then it would be necessary to know the duty of water, for if it turns out that you have contracted for more water than you need, the Court under those conditions would be inclined to give you only such amount as you need, and cover the difference by scaling down the contract price.

Mr. Longley: I would stipulate that, and will stipulate it right now. If the contract price will be scaled in proportion to the scaling of the water, we will proceed.

Mr. Hays: Are you going to scale it on this basis, or shall we leave this to the Court? That you scale it upon the basis of the injury done to you. In other words, that if you still have water enough for your

land, and we propose that kind of a plan of irrigation, and you still have water enough for your land, that you haven't lost anything.

Mr. Longley: No.

Mr. Hays: That might result in somebody being ultimately shut out, but that wouldn't necessarily result in any of them getting a less amount, but it might result in the other man getting shut out.

Mr. Longley: It is idle for you and me to discuss that. I would rather hear from Mr. Haga, he representing the persons who hold the security.

Mr. Haga: It doesn't seem to me that that question can possibly arise in this case. If we can proceed, and we are very anxious to dispose of some of the witnesses who are here at great inconvenience and expense, and if we can proceed to take their depositions now, I think we would come nearer getting together.

The Court: I will let you proceed in that way, and perhaps we will have some light upon what can be ultimately done. Have patents been issued to none of these lands?

Mr. Haga: There has been no application for patent, as I understand it, to the Government, for any of these lands.

Mr. Longley: The title to all of these Carey Act lands is still in the Federal Government.

Mr. Hays: There are some desert lands and scrip lands to which title has passed. There are some acres

of desert land on which the people proved up, and have got patent from the Government.

Mr. Longley: The taking of this testimony will work a great hardship upon the settlers' association, because of the expense involved, unless it would appear that it was necessary to take it.

The Court: This testimony is taken at the expense of the defendant now, that is, the testimony on the question of the duty of water now is necessarily taken at the expense of the party offering it.

Thereupon the depositions of C. H. Posten, John G. Boren, Joseph Boren, W. M. Worthington, W. F. Holt, J. P. Holmbran, G. J. Griffith, J. S. Welch, J. C. Wheelon, W. G. Sloan, William Wayman, E. B. Darlington, C. C. Thom, E. P. Senior and John Krall were taken under the circumstances and for the purposes indicated above.

The Court declined to permit the introduction of the evidence in said depositions and declined to consider the same herein, to which ruling the defendants excepted.

United States of America,
District of Idaho.—ss.

ORDER SETTLING STATEMENT.

It appearing that the within and foregoing statement of evidence, as amended, was lodged in due time with the Clerk of this Court, and that notice of such lodgment and of the time of the proposed settlement thereof was given to the solicitors for plaintiffs, and it appearing that the said statement is true, complete and properly prepared.

It Is Therefore Ordered, That the same be settled and allowed as a true, complete and correct statement of the evidence introduced in said cause, reduced to narrative form.

Dated this 29th day of December, 1915.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed Dec. 29, 1915.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

DECISION.

June 29, 1915.

C. O. Longley and W. E. Golden, Attorneys for Complainants.

S. H. Hays, Attorney for Defendant, Twin Falls Salmon River Land and Water Company.

P. B. Carter, Attorney for Salmon River Canal Company.

Richards & Haga and McKeen Morrow, Attorneys for Commonwealth Trust Company of Pittsburgh and A. C. Robinson.

Dietrich, District Judge:

This controversy grows out of the construction of an irrigation system under the Carey Act, commonly known as the Salmon River project. The plaintiffs are severally in the possession of land upon the project, and hold what are called settlers' contracts for water for the irrigation thereof; they bring this suit not only for themselves but in behalf of all other settlers. The defendant, Twin Falls Salmon River

Land and Water Company, hereinafter called the Company, is the corporation which, pursuant to the Idaho Statutes, contracted with the State for the construction of the system and made agreements with the plaintiffs and others for water rights. It also issued bonds, to secure the payment of which it assigned as collateral these settlers' contracts to the defendant, Robinson, and executed a trust deed on all of its interest in the system to the defendant, Commonwealth Trust Company of Pittsburgh, as trustee. All of its property rights are thus hypothecated as security for the payment of its bonds, the interest upon which has for some time been in default. The defendant, Salmon River Canal Company, is the corporation organized as provided in the State contract and the settlers' agreements, for the purpose of ultimately taking title to and operating the system; as yet it is but the creature, and is under the control of the Company.

The contract with the State was executed April 30, 1908, and the opening for entry to holders of water right agreements of 80,000 acres of land was advertised for June 1, 1908; and when this suit was commenced the Company had executed numerous agreements for water rights covering an aggregate of 73,000 acres. The gist of the plaintiffs' complaint is not that the construction work has been improperly done, but that this acreage is greatly in excess of the area for which water is available, even during years of normal run-off. For that reason, they contend, the Company has failed to comply with the terms of

its agreements, and accordingly they are refusing to pay the installments due on account of the purchase price. The trustee and the collateral holder are demanding payment, and have brought several suits in foreclosure, which naturally have caused some irritation, and altogether much unrest prevails. While it is highly desirable that the controversy be fully and finally settled without delay, its immediate determination is attended with great, if not insurmountable, difficulties. The project is dependent for its water supply upon the Salmon River, a stream which, except during the flood-water period in the spring, is a creek rather than a river. And the chief feature of the project, therefore, is a reservoir, by which it was contemplated there could be stored, for use in the summer season, 180,000 acre feet. But in determining at the present time the available supply during an average year, we are not only confronted with the uncertainties inherent in an estimate of the probable run-off of a variable stream, but we would be driven to a measure of speculation as to what the normal loss, now very great, will ultimately be from seepage in both the reservoir and the canals. And in addition to this consideration the Company is presently engaged in litigation with other claimants, who assert a superior right to divert large amounts of water from the higher reaches of the stream and its tributaries. Moreover, when it is remembered that there are no other accessible water resources and that there is a provision in the contract putting all water right agreements upon an

equal footing regardless of the date of their execution, it will be seen that the question of an appropriate and feasible remedy is a most perplexing one, should it be held that the plaintiffs are entitled to relief.

The fundamental question is one of the meaning of the contracts. The issue here is a broad one. The plaintiffs contend that primarily they contracted for a water right of a definite amount, which incidentally carried with it ownership of an undivided interest in the system. The defendants say that only an undivided interest in the system was sold, which carried no specific amount of water, but only a divisional share, the extent of which must depend upon the ratio between the water actually available for the system and the aggregate number of contracts which the Company sees fit or is able to sell.

It is quite impracticable here to follow in detail the elaborate argument by which the defendants seek to maintain their position. It is not convincing. In the first place it is highly improbable that settlers would have signed a contract by which they must obligate themselves to pay at the rate of \$40.00 per acre for the mere chance of sharing with an indefinite number of others in a projected irrigation system concerning the capacity and efficiency of which they could, in the nature of things, have but little information. As is well known, those who buy water rights upon these projects are generally men of small means, without irrigation experience, widely scattered, and often residing a long distance away. They

are not directly interested in the project as a whole, but they want to know what 40 or 80 or 160 acres of land will cost with an adequate water right. They have no means of determining whether a proposed reservoir will hold water, or whether the water shed is sufficient to fill it; these are matters peculiarly for the Company to investigate. Can it for a moment be supposed that even the most susceptible could be induced to sign contracts if they were informed that the Company would give no promise of a sufficient supply, no assurance of any specific quantity, no undertaking that any given amount would be available for the project as a whole, and no guaranteed limit upon the number of acres for which water rights would be sold?

Upon the other hand, as bearing upon the probability or improbability of the willingness of the Company to sell a specific right or a definite quantity, it had full confidence in the adequacy of its supply. In a printed circular setting forth the advantages of the project, we have, among others, these statements: "Water supply of the best and in abundance

* * *. The water supply * * * is obtained from the Salmon River, which has a vast drainage area in the Cassia National Forest Reserve. The water right is perfect, and there is no land susceptible of irrigation above the Salmon tract, and no water rights in contest. It carries water sufficient for the irrigation of more than 150,000 acres in normal years, and as a rule the spring run-off is far greater than the amount of water required for the irrigation

of this amount of land for the full season." It will thus be seen that no doubt was entertained of an abundance of water, and if it was confident of a supply sufficient in normal years for 150,000 acres, there is no apparent reason why it should not, for the purpose of selling rights for 80,000 acres, make its contracts attractive by incorporating therein an undertaking to furnish a comparatively small specific amount; with such a margin of safety there could be no substantial risk.

Now as to the contracts themselves. A printed form was prepared by the Company and offered to the public, which is the form held by the plaintiffs and all other settlers. This recites the incorporation of the Company, its execution of the State contract, the commencement of construction work, notice from the State Land Board that it (the Company) might proceed to sell or contract rights to the use of water, and thereupon it is agreed that in consideration of the payment of a certain amount of money, and the covenants on the part of the settler, the settler "shall become entitled to shares of the stock of the Salmon River Canal Company, Limited, the certificate thereof to be in form as follows:"

" Shares. 190 . .

This is to certify is the owner of shares of the capital stock of the Salmon River Canal Company, Limited.

This certificate entitles the owner thereof to receive one-hundredth of a cubic foot of water per acre per second of time for the following described land:

.....
in accordance with the terms of the contract between the State of Idaho and the Twin Falls Salmon River Land and Water Company, and this certificate also entitles the owner to a proportionate interest in the dam, canal, water rights and all other rights and franchises of the Twin Falls Salmon River Land and Water Company, based upon the number of shares finally sold in accordance with the said contract between the said Company and the State of Idaho.

SALMON RIVER CANAL COMPANY, LIMITED,
By....., President.
Attest:, Secretary.”

Then follows a clause dedicating the water right to the land described, and to none other. There are numerous other provisions touching the manner and times for paying the purchase price and maintenance charges, the temporary operation of the system, and other subjects not relevant to the present inquiry. The irrigation season is defined to be from April 1st to November 1st of each year. Certain other clauses which may be deemed to be pertinent, are as follows: “Said certificate (that is, said certificate of stock) to be delivered as provided for in said State contract and under the conditions therein stated. * * * This agreement is made in accordance with the provisions of said contract between the State of Idaho and the Company, which, together with laws of the State of Idaho under which this agreement is made, shall be regarded as defining the rights of the respective parties, and shall regulate the provisions of the

shares of stock to be issued to the purchaser by the Salmon River Canal Company, Limited. * * * This contract is made pursuant to and subject to the contract between the Company and the State of Idaho, and the existing laws of said State."

The import of the instrument, standing alone, as it would be understood by an intelligent layman with no preconceived notions of its meaning, is not open to debate. It is a contract for the sale of a specific water right of one-hundredth of a second foot per acre for each acre of land described, and as an incident thereto a proportionate interest in the irrigation system. The holder of a certificate of stock, so the contract reads, is entitled "to receive one-hundredth of a cubic foot of water per acre," and "a proportionate interest in the dam, canal, water rights," etc. The defendants' contention wholly ignores the first of these co-ordinate clauses, and limits the right granted precisely to the second. But the clauses are neither inconsistent with each other nor identical in meaning, and no reason is apparent why they should not both be given effect. If the suggestion be made that in form the contract provides only for the transfer of the certificate of stock in the Canal Company, and does not in terms convey a water right at all, the answer is that the technical form is quite unimportant. The clear purport of the entire instrument is the sale of the water right, and that is undoubtedly the sense in which the Company expected it would be understood, and in which it was understood by the settler. One of the preliminary recitals is that the State Board had notified the Company

that it could proceed to sell, not certificates of stock, but water rights; and paragraph three reads: "The consideration for the water rights hereby agreed to be conveyed is the sum of \$.," etc. It will not be assumed that the instrument was cunningly drawn to deceive the unwary, "to keep the word of promise to the ear and break it to the hope."

By itself the settler's contract thus appears to be unequivocal, and we next inquire whether its apparent import is materially qualified by its references to and adoption of the state contract. Doubtless the two instruments must be read together, and in some respects the one is to be deemed the complement of the other. But it is to be borne in mind that the settlers' contracts are subsequent in time to that of the state, and insofar as they clearly and fully express the agreement of the parties upon a given subject they are controlling, provided, of course, they contravene no statute of the state or of the nation. In this connection it is not to be overlooked that the state contract expressly provides that the Company may at its option contract to sell rights upon terms more favorable than those which it prescribes. But were a different view to be taken, is there anything in the state contract so opposed to the idea of a water right of a definite amount that it must be held to render the granting clause in the settler's contract inoperative? The first paragraph binds the Company to build the system, "and to sell shares of water rights" therein, "*and also* to transfer the ownership," etc., of the system to the settlers—a general plan entirely in har-

mony with the settler's contract. By paragraph two the Company is required to supply a reservoir capacity of 180,000 acre feet, and a canal capacity of one-hundredth of a second foot for each acre of land sold. In paragraph four there is an apparent difficulty, not, however, strictly in relation to the proposition of a definite water right; a specific amount is suggested which does not appear to correspond with that called for by the settler's contract. The paragraph recites that the Company holds a permit for the appropriation of 1500 second feet of the waters of Salmon River, and thereupon the statement is made that it "has been determined" that the natural flow of the stream, supplemented by a reservoir capacity of 180,000 acre feet, will be sufficient to provide "two and three-fourths acre feet of water per acre for each acre of land to be irrigated." Thereupon follows a reiteration of the obligation of the Company to construct canals of a sufficient capacity for one-hundredth of a second foot per acre. Now assuming a continuous flow of one-hundredth of a second foot per acre throughout the entire period from April 1st to November 1st of each year, there is a want of correspondence between two and three-fourths acre feet and one-hundredth of a second foot, for a flow of one-hundredths of a second foot would deliver two and three-fourths acre feet in approximately four and a half months. But it may very well have been understood that while the nominal irrigation season extended from April 1st to November 1st, as a matter of fact the actual season is much shorter, and in that view the discrepancy is more formal than real.

In paragraph six it is agreed, upon behalf of the state, that no application to enter land will be approved unless the applicant shall have entered into a contract with the Company "for the purchase of sufficient shares of water rights" for the irrigation of the land, "said shares or water rights to be evidenced by the stock of the Salmon River Canal Company,"—language which makes additionally clear the fact that the Company was selling water rights, not merely certificates of stock in another corporation. In the same paragraph is found an agreement that priority of application for water rights, or priority of entry and settlement, shall not confer upon the settler priority of right in the use of water. This stipulation is not to be taken as implying an understanding that water rights might be sold in excess of the normal capacity or serviceability of the system, for it is to be read in connection with another clause in the same paragraph providing "that to the extent of the capacity of the irrigation works and to *the extent of the water rights to which it is entitled*" the Company shall sell or contract to sell water rights; and the last part of paragraph nine, which expressly prohibits the sale of water rights "beyond the carrying capacity of the canal, or in excess of the appropriation of water therefor." This provision against priority of right was doubtless inserted to cover seasons of abnormally low water, and to forestall the claim that might be set up by the earlier settlers that they were entitled to be supplied to the full extent of their rights, to the exclusion of later settlers, at any time when, due to such abnormal conditions or

to some casualty, there was insufficient water fully to supply all rights. In that view the several provisions of the contract are in harmony, and all are given effect; whereas, if the defendants' contention be adopted, not only is the express language of the settler's agreement set at naught, but the clauses last above quoted from the state contract are rendered meaningless. For if the settlers' contracts convey no specific water rights, but only undivided interests in the system, it is manifest that such water right as the Company possesses never could be exhausted or exceeded, for any right, be it large or small, is capable of division into an infinite number of shares.

In paragraph eight is found the following provision: "Each of said shares or water rights shall represent a carrying capacity in said canal sufficient to deliver water at the rate of one-hundredth (1-100) of one (1) cubic foot of water per acre per second of time, and each share or water right sold or contracted to be sold as herein provided shall also represent a proportionate interest in said canal and irrigation works, together with all rights and franchises therein, based upon the number of shares finally sold in said canal." Standing alone this language is susceptible to a construction tending to support the defendants' contention; but it may also be read entirely in harmony with the settler's contract. Under the familiar rule that a printed form of agreement will be construed most strongly against the party by whom it is prepared, the doubt here would have to be resolved against the Company, even if we

had nothing but the state contract. And why, it is pertinent to ask, should the State have so carefully insisted upon a canal capacity of one-hundredth of a second foot per acre if the water was not to be supplied up to practically that capacity? It would seem to be wanton waste to build a canal twice the size needed. It is futile to say that an additional capacity might have been required for the rotation system of delivery, the possibility of which was contemplated, for, under such a system, the flow in the main canals and laterals is not necessarily variable, the fluctuation or periodic use is only in the sub-laterals and individual ditches.

In paragraph ten provision is made for the organization by the Company of the Salmon River Canal Company, and the transfer to it of the ownership and control of the system, and for the issuance to the settlers of a share of stock therein for each acre of land for which a water right is sold. The capital stock of the company, it is stipulated, shall consist of 150,000 shares, "which amount," such is the provision, "is intended to represent one share for each acre of land which may be hereafter irrigated from said canal." But while thus provision is made for the possible irrigation of 150,000 acres, there is no right or license implied to sell water rights in excess of the available supply of water, whatever that may turn out to be. Plainly the clause is to be read together with the limitation in that respect already discussed.

It is sought to attach significance to other language found in paragraph ten, to the effect that

water is to be delivered for irrigation purposes in such quantities and at such times as the condition of the crops and the weather may determine. By its very terms this provision is made to relate only to the period during which the Company shall have charge of the system, before it passes into the control of the water users. But putting aside that consideration, manifestly the regulation pertains not to the measure of the settler's water right, but only to the method of giving such right its greatest efficiency. Probably never before in Southern Idaho, save in some exceptional case, had water been given so high a duty as one-hundredth of a second foot to the acre. In the early history of the state at least one-fiftieth of a second foot was generally recognized as being necessary, and in more recent years, upon the more expensive projects, the duty was more or less frequently increased to one-eightieth of a second foot. It is reasonable to assume, therefore, that both the officers of the Company and the State Land Board realized the necessity of adopting economical methods for distributing and applying the water, if the allotment of one-hundredth of a second foot was to prove sufficient and satisfactory. Undoubtedly rotation of use is superior to the more primitive method of continuous flow, and therefore the Company was authorized, so long as it remained in control, to establish such system, and accordingly to deliver the water to which the settler was entitled at such times and in such quantities as would best supply his needs; but in thus providing for an efficient method of delivery no authority was implied to reduce the aggregate

amount or volume to which the settler is entitled. Therefore the provision, even if it could be regarded as of continuing force, in no wise tends to qualify the settler's right as the same is defined in his contract.

Perhaps in greater detail than the reasonable length of a judicial opinion would ordinarily warrant, I have now brought under review all the clauses of the State contract which can be deemed to give even the most remote support to the defendants' contention; and it is submitted that they present no real conflict with the settler's contract. Upon the other hand, we find upon further examination that in its most vital feature the precise language of the latter is expressly authorized by the former, for in paragraph ten of the State contract it is directed that "the certificate of shares of stock of the Salmon River Canal Company, Limited, shall be made to indicate and define the interests thereby represented in the said system, to-wit: A water right of one-hundredth of a cubic foot per second for each acre of land irrigated, as provided in paragraphs IV and VIII of this contract, and a proportionate interest in the said canal and irrigation works, based upon the number of shares ultimately sold therein." Moreover, by its reference to paragraphs four and eight, this provision illuminates their meaning and brings them clearly into harmony with the settler's contract. It is accordingly concluded that the theory of a sale only of undivided interests is untenable.

Now shifting their position, the defendants say that if anything more than an undivided interest was

sold, it was not a specific amount of water, but only a right to use such quantity from time to time as might be reasonably necessary to supply the settler's needs. Such presumptively must have been the intention of the parties, so it is argued, for a contract for a definite water right, if not in contravention of the constitution and statutes, is opposed to the policy of the State, in that the only right the individual can acquire in water is the right to apply it to a beneficial use, and inasmuch as needs are always variable and fluctuating, title to a definite or specific quantity of water cannot be granted or acquired. Such plausibility, however, as the reasoning may have is due to a confusion of terms, and a consequent confusion of ideas. It may be conceded that the waters of the State belong to the public, and that the private right which the individual acquires by appropriation or purchase is usufructuary only, and further that at any given time the extent of his reasonable need is the measure of the maximum amount he is entitled for the time being to divert from the stream or to receive and use. But this is not to say that in the exercise of ordinary prudence the owner of land may not, by appropriation or contract, provide himself with an available supply which shall be subject to his demand at all times when he has need therefor. Were the defendants' contention to prevail, the existing uncertainty and unstability of titles to water rights would give place to utter chaos. If, for the reasons counsel advance, it was incompetent for the settler to contract for a specific right, it was equally

incompetent for the Company by appropriation to acquire any specific or definite right. Water decrees adjudicating the extent of appropriators' rights would be of no effect, and that which the defendants are urging here, namely a determination of the duty of water, would be an idle thing, for what the farmer needs this year for the proper irrigation of his crops may be too much or too little for the coming year. A contract for a specific amount no more warrants or encourages wasteful use than does a judicial decree of State Engineer's permit. The possibility that the settler may not at all times be able to use the maximum of his available right, whether such right be acquired by appropriation or by contract, is without significance. That is only to say that, in that event, and for the time being, the water becomes subject to use by others having inferior rights. I know of no consideration of public policy opposed to the exercise by farmers of that degree of prudence which is expected of men in other vocations in providing a margin of safety to cover contingencies. What would be thought of a hydro-electric company furnishing light and traction facilities to an urban community, if it relied upon a power installation just sufficient to meet the needs of the community in normal years, without any margin of safety to cover the contingency of low water or of casualties known to be incident to such an enterprise? If the settler's right is barely sufficient for his needs in the ordinary years and in the absence of mishaps, manifestly he must suffer loss when the run-off falls below the average,

or when, through accidents to the system, there is partial or temporary loss of the use of water, or when, because of light precipitation and other weather conditions, the need of water is unusually large. Ordinarily for the farmer not to make provision against such contingencies would be counted against him for carelessness. So far as I am aware, it has never been held or contended that in making an appropriation of water from a natural stream the appropriator is limited in the right he can acquire to his minimum needs, and no reason is apparent why one who contracts to receive water from another should be limited to such needs. Conservation of water is a wise public policy, but so also is the conservation of the energy and well-being of him who uses it. Economy of use is not synonymous with minimum use. Better four prosperous farmers than five who are unsuccessful because of the uncertainty in the water supply, and better four farms uniformly fruitful than five upon which failure is ever imminent, and to which it is bound to come on the average one year in five.

Now if the contract is lawful, and if therefore the Company could and did contract for the sale of specific rights, and if such rights were not to be sold in excess of the water supply, what is the quantitative measure, if any, provided by the contracts for such rights? We have seen that the sale was of "one-hundredth of a second foot" to the acre, and ordinarily, it is to be conceded, if this phrase were used with reference alone to a water right in the natural flow

of a stream, it would be accepted as a sufficiently clear and complete description in itself. It would impart a right in the owner at any time he had need, and so long as he had need, to divert and use a stream of the magnitude thus described. The question of the quantity of water, in cubical measure, would rarely arise, for no one would be interested in calling it up. But here the outstanding feature of this system is the reservoir, and obviously in estimating the acreage capacity of a reservoir we must not only have the size of the stream to be delivered per acre, but also the length of time it is to run. Upon this point of time, it must be conceded, the contracts taken together are not wholly free from ambiguity. If we dismiss, as I think we may, without discussion, the idea that either party has the power to determine the period to suit himself, there are left three possible alternatives. We may couple the one-hundredth of a second foot with the duration of what is designated as the irrigation season, that is, from April 1st to November 1st of each year, and conclude that the settler is entitled to receive a total quantity of water equal to continuous flow at the rate of one-hundredth of a second foot per acre for the entire season, which would amount to approximately four and one-fifth acre feet. In this view the settler who uses no water during the months of April and May could double the supply to which he would ordinarily be entitled during the months of June and July. While the language of the contracts is susceptible to such a construction, it is doubtful whether at the time they

were executed any water rights had ever been so defined in this section of the country, and it is wholly improbable that either party contemplated such a radical departure in irrigation practice.

A second view is that we may reject the period of the irrigation season as not having anything to do with the question of the quantity of water, but only as establishing the limits of time beyond which no water could be furnished, and adopt the theory that one-hundredth of a second foot was to be delivered during this period at such times only as the settler's need required, without the right on his part to hoard or save for the future by failing to use continuously, and hence without the right at any time to demand a flow in excess of one-hundredth of a second foot per acre. Such a right would be closely analogous to that of one who, as an original appropriator, is decreed at the rate of one-hundredth of a second foot per acre of the natural flow of the stream; he would have the right to divert that amount continuously up to the limit of the beneficial use to which he could apply it, but he could not, by refraining from use today, divert twice the amount tomorrow. The difficulty about this view is that it fails to take account of the necessity of measuring the reservoir, and hence leaves hopelessly uncertain one factor essential to the computation of the required capacity of the system as a whole. But not only here is that one of the vital questions, but it is reasonable to suppose that the parties had it more or less definitely in mind when they entered into the contracts.

A third view, and one which in many respects is identical with the one just discussed, but which covers the point last noticed, is that a right was contemplated sufficient to enable the settler to receive water at the rate of one-hundredth of a second foot per acre continuously during the season of actual irrigation needs, the amount of which the parties estimated and understood to be two and three-fourths acre feet; and this view I am inclined to adopt. It is not at variance with any of the terms of the contract, it gives a measure of effect to all, and is in conformity with current and general irrigation practice in the State, with reference to which it may be assumed the parties contracted, and furthermore entails no unreasonable results. The parties doubtless understood that while it is provided that water could be demanded at any time between April 1st and November 1st, demands in April and October would be exceptional, and in May and September generally very light and that it was therefore reasonable to assume that on the average a resource of two and three-fourths acre feet would be sufficient to supply the settler's right of a continuous flow during the irrigation period, of one-hundredth of a second foot per acre. Practically, therefore, and in effect, the provision in the State contract with regard to the two and three-fourths acre feet is not inconsistent with or a limitation upon the definition of the settler's right embraced in his contract, namely, a right to receive one-hundredth of a second foot during the season of his need for water; it is merely the express-

ed understanding of the parties touching the total amount of water, the Company must have available in order safely to provide for this need and thus to comply with its contract. In effect it amounts to an agreement by the Company that it will make provision for that quantity, and an agreement upon the part of the State and the settler that such provision will be accepted as full compliance with the obligation to supply the settler up to the limit of his needs at the rate of one-hundredth of a second foot per acre during the entire irrigation season from April 1st to November 1st. In this way upon the one hand the right of the settler is defined, and upon the other the duty of the Company is made clear and specific. The latter could not legitimately sell water that it did not have, and when at the rate of two and three-fourths acre feet per acre it had sold up to the available supply in its reservoir, as supplemented by the natural flow of the stream during the irrigation season, it was bound to stop.

There is no force to the argument by which the defendants attempt to array against this view the provisions of paragraph ten of the state contract, authorizing rotation of use, and delivery "in such quantities and at such times as the condition of the crops and the weather may determine." Note has already been made of the fact that these provisions are temporary only, and are in terms limited to the brief period of the Company's control and administration of the system, and the whole argument might properly be dismissed with the suggestion

that we are led into confusion rather than into clarity of reasoning by doing violence to the language of the contract and arbitrarily assuming that these provisions are upon the same footing with others of a permanent character. But if for the sake of the argument we join with the defendants in indulging this unwarranted assumption, the general conclusion here reached is in no wise affected. It is plain that the two classes, the one providing for one-hundredth of a second foot per acre, and the other for "such quantities * * * as the condition of the crops and weather may determine," if relating to the same subject matter, cannot stand together; one is constant and the other variable, and plainly as measures of a single right or duty they are inconsistent. The one must be understood to pertain to the extent of the right and the other to the method of delivery. But how can we say that the settler's right is the right to receive such amounts of water and at such times during the irrigation season as the condition of his crops may require, and at the same time say that the water is to be delivered to him at the rate of one-hundredth of a second foot per acre? That would be a contradiction of terms. Upon the other hand, to say that the right is to receive water at the rate of one-hundredth of a second foot per acre, flowing continuously during the actual irrigation season, the amount thereof being estimated at two and three-fourths acre feet, and that this amount be delivered from time to time in such quantities as the conditions require, is to define the right and to prescribe a method of delivery involving no

contradictions or inconsistencies, and no departure from the best irrigation practice. As already noted, this latter view is the only one under which these clauses in paragraph ten, treated as permanent provisions, can be given effect without rendering inoperative other clauses of the contract, and in this view they are in no wise opposed to the theory of a definite and specific water right. It is scarcely necessary to add that if the view I have taken of the meaning of the contracts is correct, the duty of water, when applied in accordance with principles which are coming to have the sanction of scientific experimentation, is an immaterial inquiry. The rights of the parties are defined by their written agreements, and even if upon investigation we should find, in harmony with the popular view, that one-hundredth of a second foot is quite inadequate, no relief upon that account could be granted to the plaintiffs. So upon the other hand, and for like reasons, a finding that the settler could get along with something less than that amount would not furnish ground upon which to relieve the defendant company from its contractual obligations. Whatever may be the proper duty of water, we cannot make a new agreement for the parties. If the right granted is too great, and the settler attempts to use water wastefully, that is a matter of which the State and other appropriators upon the stream may complain; it is no concern of the defendants. The terms of the agreement were fixed by the Company, not by the settler; presumably the latter was induced to obligate himself to pay the price in the expectation that he would get the prom-

ised water service. It may be assumed that at the time the contracts were negotiated the Company deemed it impracticable to adopt a higher duty for water, and thought that few would be willing to undertake to reclaim the land, and in many cases to risk their all, without the assurance of at least the supply agreed upon. They are entitled to receive what they contracted for. It is to be borne in mind that the evidence touching the duty of water was not offered for the purpose of illuminating the meaning of the writings. Possibly knowledge of what at the time they were executed, was generally understood to be a reasonable amount of water for irrigation needs might be of some assistance in determining the meaning the parties attached to the phraseology employed, but manifestly the present views of scientific experts and skilled specialists cannot be considered for that purpose, and in that view the evidence was excluded from present consideration.

To summarize, the contract, as I have construed it, runs counter to no provision of the constitution, no statute, and no principle of public policy. The right provided for is no more specific than that defined and established by a judicial decree or by a proceeding before the State Engineer in favor of an original appropriator. The construction no more authorizes or permits wasteful use than does a decree or a State Engineer's permit. It eliminates inconsistencies and gives effect to all the provisions of the agreements. Not only is it in accord with the plain import of the language employed, but it is strongly supported by the surrounding circumstances. As we have seen,

the Company had confidence that the stream would supply a sufficient amount for 150,000 acres, and it procured a permit sufficient to provide at the rate of one-hundredth of a second foot per acre for that area. At that time water rights were customarily appropriated, decreed, contracted for, and sold, as definite quantities, and with rare, if any, exceptions, the amount deemed to be necessary, both popularly and by the courts, exceeded the amount here provided for. In the light of these circumstances the contract must have appeared to be a reasonable one for the Company to make, and no argument of improbability is available as a ground for qualifying the meaning which the phraseology naturally imports.

If then the settler is entitled to receive one-hundredth of a second foot or two and three-fourths acre feet per acre, it stands conceded that the Company sold, and has outstanding, contracts very greatly in excess of the capacity of the system. Just what this excess is I do not at the present juncture attempt to determine. Aside from the consideration that the period during which we have accurate information touching the run-off of the water shed is comparatively short, and therefore the data inconclusive, a definite finding upon this point should await the final determination of claims of other appropriators upon the stream, which are now in the course of adjudication in this court. Prior rights are asserted under these claims, and they are of such magnitude that no reliable computation can be made of the amount of water probably available for this project in normal

years, until their status and dignity are determined. It is also highly desirable, if not wholly indispensable, that we have the benefit of further experience and observation touching the amount of seepage which may be permanently expected in both the reservoir and the canals.

RELIEF.

While if the conclusions I have reached are correct plainly the settlers are entitled to a measure of relief, a feasible remedy is not so clear. The obvious course would be to require the Company to supplement its existing water supply, but additional water is not to be had. If it be suggested that the area of the tract be reduced by cutting off all contracts executed after the full capacity of the system had been sold, it is to be said that even should it be held that such a course is legally possible, it could not be taken without the presence of all the contract holders; furthermore, it is not impossible that some of those who contracted last have been more diligent in reclaiming their lands and placing improvements thereon than those who contracted earlier. So of the suggestion that all contracts be scaled down proportionately both in the amount of the water right and the consideration to be paid therefor, the practical difficulties are very great, and we have not before us the contract holders, who are admittedly indispensable parties to such relief. The Company should, of course, sell no more rights, and, if it be necessary, should be restrained from so doing. Furthermore, it should, insofar as may be practicable, call in such

outstanding contracts as are subject to rescission. It was represented at the trial, as I understood, that so many contracts had been abandoned, and so many others are subject to forfeiture, that the Company might, at its option, reduce the aggregate of the outstanding contracts from approximately 73,000 acres to approximately 55,000 acres. It should be required to exercise its right of rescission wherever it exists, and by negotiation it is reasonable to believe, it may further reduce the irrigable area. It should also be restrained from attempting to collect overdue installments on contracts until there is reasonable assurance that the settlers will receive that for which they have promised to pay. For the present at least I do not look favorably upon the prayer for a receiver. The system is apparently being carefully and intelligently managed, and no relief is needed in that respect. The suggestion that a receiver collect the installments due, for the purpose of creating a fund out of which to pay damages, if feasible at all, does not impress me as being presently necessary. An order or an interlocutory decree will be entered restraining the Company from making any contracts or waiving any right of forfeiture of existing ones, and also restraining it, together with the other defendants, from collecting or attempting to enforce payments upon the contracts until the settlers have been provided with the water supply contracted for, or are given trustworthy assurance that it will be provided. Leave will be granted to either party to make application at any time for the introduction of further

proof touching the available water supply, and more particularly relating to (1) the amount and dignity of the rights awarded to adverse claimants in the Vineyard Company suit hereinbefore referred to and now pending in this court; (2) seepage in the reservoir basin and the canal system; and (3) the aggregate amount of water contracts actually outstanding at the time of the application; and, upon the submission of such proof, for the entry of a final decree.

Endorsed: Filed June 30, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

NOTICE.

To the Plaintiffs and Their Attorneys:

Please take NOTICE that the defendant herein will on the 29th day of October, 1915, at 10:00 o'clock A. M. of said day move the above court at the court room thereof for leave to introduce further proof herein in order to explain the terms and conditions of the contract between the State of Idaho, and the Twin Falls Salmon River Land and Water Company dated April 30th, 1908; that said application will be made upon the records and files of this court and upon affidavits hereafter to be filed.

RICHARDS & HAGA,

S. H. HAYS,

P. B. CARTER,

Attorneys for Defendant,

Residing at Boise, Idaho.

Endorsed: Filed Oct. 29, 1915. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

AFFIDAVIT OF S. H. HAYS ON APPLICATION
FOR REHEARING AND REOPENING OF
THE CASE.

State of Idaho,
County of Ada,—ss.

S. H. Hays being first duly sworn deposes and says that he is the attorney for the Twin Falls Salmon River Land and Water Company, one of the defendants herein; that he drew the contract between the State of Idaho and the Twin Falls Salmon River Land and Water Company dated April 30th, 1908.

That during the years 1899 and 1900, affiant was Attorney General of the State of Idaho, and as such ex-officio a member of and secretary of the State Board of Land Commissioners of said State.

That in the year 1899, as a part of his official duty as such Attorney General, and in connection with the State Engineer of the State of Idaho, there was prepared a compilation of the irrigation laws of the State of Idaho, a set of regulations for the use of the State Land Board and State Engineer's office in relation to the Carey Act and a form of contract which persons or corporations proposing to construct irrigation works under the terms of what are known as the Carey Act should enter into; that this form of contract, in substance, was presented to affiant by D. W. Ross, the then State Engineer of the State of Idaho for approval as a part of the regulations of the State Engineer's office to be adopted in conjunction with the State Land Board; that said form of

contract was a form of contract which had been procured by the said State Engineer from the State Engineer of Wyoming; that after some changes and modifications, the form of contract was approved by affiant as such Attorney General, and the regulations duly issued by the State Engineer's office and by the State Land Board; that the form of contract at that time proposed for execution by companies constructing works under the terms of the Carey Act is hereto attached, made a part hereof and marked Exhibit "A," and that the said form of contract is the same form that appears at pages 100 to 107 of the Rules and Regulations of the State Land Board and the State Engineer's office in relation thereto published in the year 1899.

That the first application for lands under the terms of the Carey Act in the State of Idaho was made by the American Falls Canal and Power Company about the year 1895; that said application was consummated by the making of a contract between said company and the State on the 21st day of February, 1901; that a copy of the ninth paragraph of the contract so made is hereto attached, made a part hereof and marked Exhibit "B."

That the second application or proposal to irrigate lands under the terms of said act was made by the Mullins Canal and Reservoir Company about the year 1895 or 1896, and that said application was consummated by entering into a contract with the State of Idaho on the 20th day of February, 1902; that a copy of the ninth paragraph of said contract

is hereunto annexed, made a part hereof and marked Exhibit "C."

That said contracts with the American Falls Canal and Power Company and the Mullins Canal and Reservoir Company above mentioned were in substantially the form set forth in Exhibit "A."

That the third application made for the segregation of land and the building of irrigation works under the terms of the said Carey Act in the State of Idaho was made by the Twin Falls Land and Water Company and said application was consummated by entering into a contract on the 2nd day of January, 1903, with the State of Idaho, a copy of which contract is filed herewith and marked Exhibit "D."

That in the contract with the American Falls Canal and Power Company above mentioned, it was provided in the ninth paragraph thereof that persons purchasing shares or water rights in the canal system should have the use of at least two and one-half acre feet of water during each and every irrigation season.

That in paragraph nine of the contract with the Mullins Canal and Reservoir Company, it was provided that persons purchasing shares in the system should have a water right to the use of at least three acre feet of water to be delivered from the canal during the spring flow of the river in each irrigation season, but that during periods of scarcity, it should be delivered to the users in such heads and at such times as the condition of the soil, crops and weather might determine.

That at the time of the making of the contracts with the State above mentioned, and at all times since and at the time of the making of the contract with the defendant herein, it has been customary for the persons making the proposal to build irrigation works to present a list of the lands to be irrigated, together with a plan showing the mode of irrigation thereof, and to make a statement with regard to the water right and water supply claimed. Thereupon, it was the duty of the State Engineer to determine the sufficiency of the water supply and the feasibility of the plan presented; that the area to be irrigated has always been finally passed upon by the State Engineer and the State Board of Land Commissioners of the State of Idaho, the Engineer passing upon the amount of land that could be irrigated by the water supply available as provided by law and the State Land Board finally passing upon the entire proposal as provided by statute.

That Section 1615 of the Revised Codes was in 1899 and still is in force and effect and provided then as it does now, that the perpetual water rights which should be sold to settlers should

“embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto.”

That in the making of the said contract Exhibit “D,” the form of the ninth paragraph was changed so as to omit therefrom any reference to the use of a certain number of acre feet of water, it being provid-

ed in said paragraph nine that the water should be delivered.

“in such quantities and at such times as the condition of the soil, crops and weather should determine”;

That said contract was drawn by affiant and was approved by the State Board of Land Commissioners of the State of Idaho, and that said provision providing for the delivery of a specific amount of water was intentionally omitted in accordance with what the contracting parties then believed to be the best irrigation practice; that prior to that time, it had been customary in many parts of the State of Idaho for the users of water to demand the continuous flow of a certain number of inches or second feet of water; that it was at the time of the making of said contract Exhibit “D” and for some time prior thereto, had been recognized that the best irrigation practice required a delivery by rotation; that the desirability of the rotation system had been set forth in the pamphlet containing the irrigation laws and the rules and regulations of the Land Board and State Engineer’s office hereinbefore mentioned at page 119 thereof.

That in making the segregation of lands under the application mentioned in Exhibit “D,” it had been proposed to irrigate 272,000 acres of land and for this purpose, a water right notice providing for the diversion of 3,400 second feet of water at the point of diversion mentioned therein was provided for; that it was understood at the time of the making of

said contract Exhibit "D" that the said contract meant that the canal system should be built of a size sufficient to deliver a head of water of one-eightieth of a second foot per acre, but that the water should only be delivered in such quantities and at such times as the condition of the soil, crops and weather might determine and according to the rules and regulations based upon a system of distribution of water to the irrigators in turn and by rotation as would best protect and serve the interests of all the users from the canal system. That it was believed at that time by the parties entering into the contract that the provision in regard to the rotation system in effect made the beneficial use of water the measure of the right; that there was also another change made in the form of contract, it being provided in the form Exhibit "D" that a corporation made up of the settlers should be formed for the purpose of owning and operating the system as set forth in paragraph eight of said contract; that this company so formed by the settlers is commonly known as the Operating Company; that several contracts were entered into with the State Board of Land Commissioners by various corporations desiring to reclaim land under the Carey Act subsequent to the making of the contract Exhibit "D"; that one of the most important of said contracts was the contract entered into between the Twin Falls North Side Land and Water Company and the State of Idaho, a copy of which is filed herewith and marked Exhibit "E"; that in this form of contract, there were in substance two changes, to-wit: the Operating Company, instead of being

formed when the works were completed, was organized at the beginning of operations, and a provision was inserted providing that amendments to the contract might be made by the parties (see p. 22).

That as before stated the project of the Twin Falls Land and Water Company was organized for the irrigation of approximately 272,000 acres of land and for this purpose, a water right of 3,400 second feet was taken out, this amount being allotted to the entire area mentioned; that this amount was measured at the place of diversion from the stream; that in the making of all subsequent Carey Act contracts, the general form provided in the contract with the Twin Falls Land and Water Company, Exhibit "D," was followed, except in regard to the provisions as to the time of the organization of the Operating Company which was changed as shown in Exhibit "E." That upon these projects, the manner of procuring the water supply and providing for its use was as follows:

1. A water permit was taken out under the laws of the State and the practice of the State Engineer's office; that this water permit provided for the diversion from the stream of a certain number of second feet of water for the irrigation of a certain number of acres of land; that these water permits usually provided for the diversion from the stream of 1-80 of a second foot or 0.01 of a second foot of water *measured at the point of diversion* for each acre of land segregated.

In the case at bar, the water permit, No. 2659, provided for the diversion of 1,500 second feet for an area of land originally estimated at 150,000 acres.

2. That in providing for the administration and handling of this water supply, it was provided as it is in paragraph nine of the contract between the State of Idaho, and the Twin Falls Salmon River Land and Water Company, dated April 30th, 1908 (see paragraph ten), that,

“water shall be measured to users from the place of diversion at the main lateral of such irrigation system in such quantities and at such times as the condition of the crops and weather may determine, but according to such rules and regulations based upon a system of distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from said canal system.”

It was the purpose of this provision, as understood by the persons making the contract and of all the other Carey Act contracts, that rules and regulations should be made by the company for the use of the water supply and that water should only be delivered to a user at such times as the crops and weather might require under a rotation system instead of under a system of continuous flow. It was intended and expected that in practice the water should be delivered to each user for the use of his crop as frequently as good farming practice required it and that at each delivery, so much water should be delivered as was necessary for the purpose. There was at the time

a fair understanding as to the number of times that grain, alfalfa and other crops should be irrigated and also as to the time necessary for each irrigation although much of the last named information was in crude shape. It had been understood, however, at the very outset when the Carey Act contract was first prepared in the form Exhibit "A," that it was probable that the average depth of the water required for irrigation was from two to two and a half acre feet in the Boise Valley where the altitude was approximately 2,600 feet, where the climate was warmer and the water requirements greater than in most sections of the State.

The State Engineer of the State of Idaho in his Biennial Report for the years 1899 and 1900 states at page 86 of the report as follows:

"I am free to admit that notwithstanding the two years' study of this question in the Boise Valley, we know but little regarding the actual duty of the water. To make observations to enable one to safely estimate the duty of a given volume of water would require a careful study of the subject extending over years. The general results obtained as shown by the table indicate, however, that it is possible to obtain a very high duty in this valley. From the observations made, I think we may safely estimate that the average depth required for irrigation here will be from two to two and five-tenths acre feet."

That it was in pursuance of the view thus expressed that it was provided in the contract with the

American Falls Canal & Power Company herein-above mentioned that the persons purchasing water rights should have the use of two and one-half acre feet of water during each irrigation season; that the provision for a certain number of acre feet of water to be delivered to a settler during an irrigation season was left out of the contract, Exhibit D, of the Twin Falls Land and Water Company intentionally for the reason that it was thought if a sufficient supply was appropriated from the stream for the use of the entire project and the settler was given a proportionate interest therein, that it was not necessary to make any further provision in view of the fact that the water supply was examined and approved by the State Engineer before the project was constructed and the belief that such a provision might interfere with the provision in regard to a rotation system and the delivery under rules and regulations of such quantity as was necessary; that it was expected in this way by the parties making these contracts that a very high duty of water would be obtained and the best possible manner of use provided; that inasmuch as the works were to go over to a private corporation which ultimately might operate them as they wished, it was made the duty of the Construction Company to establish the rotation system and to put such plan upon its feet in order that the settlers might have when they took the project over a first-class system and method of irrigation already in actual practice.

That agitation for a rotation system on canals was commenced about the year 1899 and has been

kept up ever since, such method being advocated with uniformity in all of the reports of the State Engineer; that taking up water for a Carey Act project was done in the same way as taking up water for an individual farm and that its use upon the project was compared with the use which might be made upon a large farm after it was cut up into smaller tracts as shown by the illustration used by the State Engineer of Idaho at page 122 of the pamphlet entitled, "Irrigation Laws of Idaho. Measurement and Distribution of Water for Irrigation," printed in 1899.

That the original promoters of the project here in question estimated that the water supply was sufficient for 150,000 acres of land and caused a water permit for 1,500 second feet of water to be taken out accordingly. That just prior to the opening of the lands for settlement on the first of June, 1908, and after the project had been taken over by the company constructing the works, it was arranged between the State Board of Land Commissioners and the company that the works should at first be built only for 100,000 acres and it was subsequently agreed between the parties that only 80,000 acres of Carey Act lands should be open for settlement and that at the time this was done, the basis of estimating the water supply was upon the delivery of 22 acre inches or 1.83 acre feet at the point of delivery to the farm.

That a certified copy of the original report of the State Engineer upon this project is hereto attached and made a part hereof.

That the years 1887 (or some say 1888), 1905 and 1915, have been years, as shown by the records, of abnormally low runoff on all streams in Southern Idaho as well as adjoining states; that the runoff of streams in other years have fluctuated to a great extent, but the above mentioned are years of excessively abnormal conditions.

S. H. HAYS.

Subscribed and sworn to before me this 29th day of October, 1915.

(Seal)

W. D. McREYNOLDS,
Clerk of U. S. District Court.

By PEARL E. ZANGER,
Deputy.

Endorsed: Filed Oct. 29, 1915. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

EXHIBIT "A."

Contract.

This agreement, made and entered into in duplicate this.....day of....., 1900, by and between the State of Idaho, by and through..... Governor;Secretary of State;Attorney General;Superintendent of Public Instruction; composing the State Board of Land Commissioners of said State, party of the first part, and....., a corporation organized and existing under the laws of the State of....., party of the second part.

Witnesseth, That the State Board of Land Commissioners of the State of Idaho, composed as above stated, in pursuance of the powers and authority in

it vested by virtue of an act of the Legislature of the State of Idaho, entitled, "An Act to Provide for a State Engineer, Defining his Duties and Regulating his Compensation, and to Provide for the Acceptance by the State of Idaho from the United States of Certain Lands and to Provide for the Reclamation and Disposal of the Same": First enacted the Third Session of the said Legislature and approved March 9th, 1895, amended at the Fourth Session, said amendment approved March 3rd, 1897, re-enacted as amended at the Fifth Session of the said Legislature and approved March 2nd, 1899, after due consideration of a proposal filed with the said board by the said party of the second part to build and construct a certain irrigating canal, known as the..... in the Counties of....., State of Idaho, did by a resolution adopted at a meeting of said board, held on the.....day of.....A. D. 19..., resolve to enter into a contract with the said party of the second part to construct said canal and irrigating works upon the following express terms and conditions:

Purpose of Contract.

First: That for and in consideration of the covenants and agreements of the said party of the first part herein contained, the said party of the second part agrees to construct and build the said..... and its main laterals beginning at a point on thewhich point of diversion as well as the course and direction of said main canal are more particularly described and laid down on the map descrip-

tive of said canal and the lands herein described, which said map is hereto attached and made a part of this contract and marked "Exhibit," a copy of which is now filed in the office of the State Engineer; and to sell shares or water rights in the said canal system, from time to time, as will hereinafter be provided, to the person or persons filing upon the lands herein described, and to the owner or owners of other lands not described herein, but which are susceptible of irrigation from this canal system, said shares or water rights to be sold on the terms herein provided; and to transfer the management and control of said canal system to the said purchasers of shares or water rights in the manner as will hereinafter be provided.

General Specifications for the Construction of the Canal System.

Second: It is hereby agreed that the said party of the second part shall construct the said canal and lateral system according to the following specifications:

Capacity of the main canal:

Alignment of the main canal and main laterals:

Grades and levels of main canal:

Headgates and other structures:

Culverts:

Bridges:

Embankments:

Waste ways:

Lateral System:

Grades of main laterals:

Maps of canal and lateral system:

General: In all matters of location and construction of the said canal system, the permanency, utility and fitness of each and every part, with a due regard for economy, shall be the essence of these specifications, and all matters of location and construction not definitely fixed herein, shall be submitted to the State Engineer of Idaho for his approval.

Right-of-Way.

Third: The said party of the first part hereby grants to the said party of the second part a right-of-way across lands belonging to the State of Idaho, or that may be ceded to the State, for the construction and operation of the said canal and main laterals, which right-of-way shall be equal to the actual width of the said canal or lateral at its base or from toe to toe of the embankment of the same, together with a strip of land along one side of said canal or lateral and adjacent thereto, said strip of land not to exceed fifty (50) feet in width along the main canal and thirty (30) feet in width along main laterals and to be used for the purpose of a roadway.

Permit to Appropriate Water.

Fourth: As there has been issued to the party of the second part a permit to construct said....., and to divert and appropriate the water of thefor the purpose of irrigation, power and other beneficial uses, said permit being numbered....., and recorded in the office of the State Engineer of the State of Idaho, in book....on pageand a permit for extension of area to be reclaimed under said canal numbered.....and re-

corded in the office of the said State Engineer, in book of enlargements, on page, the said party of the second part agrees to furnish and deliver through said canal, water sufficient to irrigate and reclaim such portions of the following described lands, together with such portions of other lands not described herein but which lie below the line of said canal, as are susceptible of irrigation and reclamation therefrom.

Entry of the Lands.

Fifth: Upon the completion of this contract and when the actual construction of said canal shall have been inaugurated, the State Board of Land Commissioners shall cause to be opened for settlement by advertisement as is provided by law, all that part of the lands herein described lying and being situate That when said canal shall have been completed to said as aforesaid, then the State Board of Land Commissioners shall cause to be opened for settlement in like manner, all of said herein described lands lying and being situate, and when said canal shall have been completed to said then the remaining portion of said lands shall be caused to be thrown open to settlement in the manner provided by law.

Application for the Entry of Lands.

Sixth: That said party of the first part, through its State Board of Land Commissioners as aforesaid, agree not to approve any application or filings on said lands until the person or persons so applying

shall furnish to the said board, as aforesaid, a copy of a contract entered into with the said party of the second part, for the purchase of sufficient shares or water rights in said canal and irrigation works to represent a carrying capacity as herein provided for the lands upon which said person or persons desire to file, nor shall the said board approve any such filing until it is satisfied that the said party of the second part has said canal and irrigation works constructed and in operation to such an extent that it can furnish the full allowance of water for the land upon which such person or persons may desire to file.

Price to Be Charged for the Lands by the State.

Seventh: That the said party of the first part, acting through its State Board of Land Commissioners, agrees to sell the lands herein described, to such persons as are by law entitled to file upon the same, for the sum of fifty (50) cents per acre, one-half of which shall be paid at the time application for the entry of such lands is made to the State Board of Land Commissioners, the remaining one-half of such purchase price to be paid at the time such person or persons shall make final proof as by law required.

Sale of the Canal to the Persons Filing on the Land.

Eighth: The said party of the second part hereby agrees to sell and convey by warranty deed to the person or persons filing upon said lands herein described, or to the owner of other lands not described herein, but susceptible of irrigation from canal, a water right or share in the said canal for

each and every acre owned, filed upon or purchased from the state. Each of said shares or water rights shall represent a carrying capacity in said canal sufficient to deliver water at the rate of one-seventieth of a second foot per acre, and each share or water right sold and conveyed as herein provided, shall also represent a proportional interest in the said canal, together with all its rights and franchises, said proportion to be based upon the number of shares finally sold in the said canal, and such water rights or shares shall be sold to the person or persons aforesaid as follows: To the person or persons filing upon any of the lands herein described at a price not exceedingdollars per share, the same to be paid for as follows:; to the person or persons purchasing any portion of sections numbered sixteen or thirty-six or any other lands belonging to the State of Idaho which are susceptible of irrigation and reclamation from this canal and to which said water rights or shares are to be applied and dedicated at a price not exceedingdollars per share, the same to be paid for as follows:; to the person or persons owning other lands not herein described but susceptible of irrigation and reclamation from this canal and to which said water rights or shares are to be applied and dedicated, at a price not exceedingdollars per share, the same to be paid for as follows: It is understood, however, that in all cases any and all such payments may be made at any time in advance of maturity of the same at the option of the

purchaser of said shares in said canal. Provided, that in no case will water rights or shares be dedicated to any of the lands aforementioned, by the party of the second part, beyond the carrying capacity of this canal system.

Water Right Dedicated to the Land.

Ninth. The said party of the second part shall, upon the sale of shares or water rights in said canal as hereinbefore provided, dedicate the said shares or water rights to the land owner, or entered by the person or persons purchasing such shares, and the terms of said dedication shall provide that each and every acre of land owned or entered under the provisions of the act first mentioned in this contract, by the person or persons purchasing said shares, shall have a right to the use of at least acre feet of water to be delivered from the said canal during each and every irrigating season, said amount to be measured at or within one-half mile from the place of intended use, in such quantities and at such times as the condition of the soil, crops and weather may determine, but according to such rules and regulations based upon a system of distribution of water to the irrigators in turn or by rotation, as will best protect and serve the interests of all the users of water from this canal system. It is agreed that said system of distribution by rotation shall be devised by the said party of the second part, and that it shall meet the approval of the State Engineer.

And it is further agreed that the water right so dedicated to the said lands shall be a part of and

shall relate to the water right belonging to the said canal, the terms of the deed dedicating the said water right to said land, together with all other contracts entered into between the said party of the second part and the said purchasers of shares, shall be based upon the provisions of this contract and shall not contain a waiver of any rights of the said purchase of shares as are provided herein and in the act first mentioned in this contract, but all such deeds and contracts shall meet the approval of the said party of the first part, the State of Idaho.

Measurement of the Water and Charges for Its Delivery to the User.

Tenth: The said party of the second part agrees to construct and operate said canal and main laterals so that the water conducted through the same may be delivered at a point not exceeding one-half mile from any legal subdivision of one hundred and sixty acres of the land herein described, filed upon, owned or occupied as aforesaid, and to be irrigated or reclaimed by the water conducted through said canal and main laterals. That it will construct, place in position and maintain all headgates, flumes, weirs and other devices through which water may be turned off from said canal or main laterals; that the said party of the second part will construct and place in said canal or laterals such devices for measuring water to the irrigators, as shall be deemed necessary and best by the State Engineer of Idaho.

It is hereby agreed that every purchaser of shares in the said canal shall be entitled to have delivered

for the irrigation of his land, its full allowance of water as herein provided, and it is hereby stipulated and agreed that the party of the second part may make a charge for the delivery of said water for irrigation, to the purchaser of said shares, on the following basis and in the following manner: of the total quantity of water dedicated to his land shall be delivered free of all charges during the first irrigating season that water is delivered to the said purchaser of shares, but after the said shall have been delivered free of charge, a charge not to exceed cents per acre foot may be made for the delivery of each and every acre foot of water at the request of the said purchaser of shares to the full allowance of feet per acre for all the land owned or entered under the provisions of the Act first mentioned in this contract, by the purchaser of said shares, when for the delivery of each and every acre foot of water at the request of said purchaser, over and above the said full allowance, a charge not to exceed cents may be made. During the second season after the date of the said first delivery of water and during each season thereafter until the control and management of the said canal system has passed from said party of the second part as hereinafter provided, a charge not to exceed cents per acre foot may be made for the delivery of water at the request of the said purchaser of shares up to the said full allowance, but after said allowance has been delivered, a charge not to exceed cents per acre foot may be made for the delivery of each

and every acre foot delivered at the request of the said purchaser of shares.

*Status of the Purchaser of Shares—Indebtedness
Against Canal.*

Eleventh: It is hereby agreed by the party of the second part that the purchaser or purchasers of shares or water rights in the said canal, shall, by virtue of the ownership of said shares, become co-owners or tenants in common in said canal, and the relations of said purchasers to the said party of the second part shall be based upon the provisions contained in a contract for the purchase of said water rights or shares from the said party of the second part, but whenever, from time to time, water rights or shares representing the full carrying capacity of the said canal shall have been sold by the said party of the second part, the said party of the second part shall be entitled to increase the capacity of said canal or any lateral thereof, provided, that the said party of the second part shall sell, issue and dispose of additional shares or water rights to the full extent of said enlargement; provided, that the said enlargement shall be made before the time fixed in the contract for the completion of the said canal system; and it is hereby agreed that the said new shares shall be issued and sold according to the terms and conditions as hereinbefore provided, and be subject to the same conditions as will hereafter be stated in this contract.

It is further agreed that the said party of the second part, for the purpose of raising funds to con-

struct the said canal system, may execute a mortgage or deed of trust upon all its rights which it has or may hereafter acquire by virtue of this contract to any third party, provided that such mortgage or deed of trust shall be made subject to this contract, and provided further that such deed of trust shall contain a clause requiring the trustee or mortgagee, as the case may be, upon the payment to such mortgagee or trustee of the amount stipulated to be paid by any purchaser of water rights to thereupon give a full release to such purchaser for the amount of the water right so purchased by him; such mortgage or deed of trust to be subject to the approval of the Attorney General of the State of Idaho. All payments on water rights are to be made to the trustee or mortgagee, if any, but trustee or mortgagee may consent otherwise.

Transfer of the Management and Control of the Said Canal System to the Purchaser of Shares.

Twelfth: The said party of the second part agrees to maintain and operate said canal and lateral system at its own proper cost and expense until it shall have sold and dedicated water rights or shares in the said canal to.....per cent of the land herein described, susceptible of irrigation and reclamation, when it agrees to transfer to the said owners and holders of shares the control and management of said canal system, together with all the rights and franchises belonging thereto, and to transfer said canal and lateral system to said owners and holders of shares in good order; provided, that said transfer

may be made before the number of shares aforesaid in said canal have been sold, if the said party of the second part so elects, but when said transfer shall be made, the said party of the second part shall elect to donate or transfer to the owners and holders of shares in the said canal as aforesaid all its unsold shares therein or retain such unsold shares or any portion of them, on which shares so retained it shall be liable to assessment for the maintenance, repairs and superintendence of the said canal and main laterals to whatever proportional amount the number of shares so retained bears to the whole number of shares in said canal. Provided, that said transfer shall be made not later than years after the date set in this contract for the completion of the said canal.

Completion of the Canal System—Forfeiture.

Thirteenth: The said party of the second part agrees to begin work on the said canal within from the date of this contract; and to have completed and in operation miles of said canal and main laterals belonging thereto within a period of from the date of this contract, and to have the entire main canal and lateral system and all headgates, lateral gates, weirs and other structures belonging thereto, built in a good and substantial manner in accordance with the specifications herein provided and to the satisfaction of the State Engineer of Idaho, and to have said canal system in operation on or before five years from the date of this contract.

The said party of the second part agrees that upon a failure on its part to begin the construction of the

said canal within the time specified in this contract, or upon a failure to proceed with the work, as agreed upon in this contract, after receiving days notice from the secretary of the State Board of Land Commissioners, the bond given to secure the strict performance of the agreement herein contained, together with any portion or portions of said canal that may have been constructed under the conditions of the contract, shall be at once forfeited to the said party of the first part, the State of Idaho, and that the said party of the first part, acting through its said board of land commissioners, may declare the same forfeited, and proceed to enforce said bond and to take possession of said canal and irrigation works, and all the rights the said party may have acquired therein, as provided in the Act of the Legislature of the State of Idaho, first referred to in this contract.

Estimated Cost.

The estimated cost of the proposed irrigation works is

It is understood and agreed that the existing law under which this contract is executed is as much a part of this contract as if specifically herein set forth.

In witness whereof, the said party of the first part, the State of Idaho, has caused this agreement to be signed in duplicate by its Governor, Secretary of State, Attorney General, and Superintendent of Public Instruction, composing as aforesaid the State Board of Land Commissioners of the State of Idaho, and the said party of the second part has hereunto

caused its corporate name to be attached by its President, and attested by its Secretary, and its corporate seal to be affixed as well as a duplicate hereof, the day and year first above written.

For the State of Idaho:

By
Governor.

By
Secretary of State.

By
Attorney General.

By
Superintendent Public Instruction.

..... Company.

By
President.

Attest:
Secretary.

Endorsed: Filed Oct. 29, 1915. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

EXHIBIT "B."

Copy of Paragraph Nine of the Contract between the STATE OF IDAHO and the AMERICAN FALLS CANAL AND POWER COMPANY, entered into February 21st, 1901:

Water Right Dedicated to the Land.

Ninth: The said party of the second part, shall, upon the sale of shares or water rights in said canal, as hereinbefore provided, dedicate the said shares or

water rights, to the land owned or entered by the person or persons purchasing such shares, and the terms of said dedication shall provide that each and every acre of land owned or entered under the provisions of the Act first mentioned in this contract, by the person or persons purchasing said shares, shall have a right to the use of at least two and one-half ($2\frac{1}{2}$) acre feet of water to be delivered from the said canal during each and every irrigating season, said amount to be measured at or within one-half mile from the place of intended use, in such quantities and at such times as the condition of the soil, crops and weather may determine, but according to such rules and regulations based upon a system of distribution of water to the irrigators in turn or by rotation, as will best protect and serve the interests of all the users of water from this canal system. It is agreed that said system of distribution by rotation shall be devised by the said party of the second part, and that it shall meet the approval of the State Engineer.

And it is further agreed that the water right so dedicated to the said lands shall be part of and shall relate to the water right belonging to the said Bingham County and American Falls Canal, the terms of the deed dedicating the said water right to said land, together with all other contracts entered into between the said party of the second part and the said purchasers of shares, shall be based upon the provisions of this contract and shall not contain a waiver of any rights of the said purchaser of shares as are provided herein and in the Act first mentioned

in this contract, but all such deeds and contracts shall meet the approval of the said party of the first part, the State of Idaho.

Endorsed: Filed Oct. 29, 1915. W. D. McReynolds, Clerk.

EXHIBIT "C."

Copy of Paragraph *Nine* of the Contract between the STATE OF IDAHO and the MULLINS CANAL AND RESERVOIR COMPANY, dated February 20th, 1902.

Water Right Dedicated to the Land.

Ninth: The said party of the second part, shall, upon the sale of shares or water rights in said canal as hereinbefore provided, dedicate the said shares or water rights, to the land owned or entered by the person or persons purchasing such shares, and the terms of said dedication shall provide that each and every acre of land owned or entered under the provisions of the Act first mentioned in this Contract, by the person or persons purchasing said shares, shall have a right to the use of at least three (3) acre feet of water to be delivered from the said canal during the spring flow of the Malade River of each and every irrigation season, said amount to be measured at or within one-half mile from the place of intended use, in such quantities and at such times as the user thereof may desire when the supply is plentiful; but during periods of scarcity, it shall be delivered to the users in such heads and at such times as the condition of the soil, crops and weather may determine,

and according to such rules and regulations, based upon a system of distribution of water to the irrigators in turn or by rotation, as will best protect and serve the interests of all the users of water from this canal system. It is agreed that the said system of distribution by rotation shall be devised by the said party of the second part, and that it shall meet the approval of the State Engineer. The shares or water rights in the reservoir system shall in like manner be dedicated to the land upon which said water is to be applied, but the holder of a water right or share in said reservoir shall be entitled to have the water represented by said shares delivered to him in such quantities and at such times as he may deem necessary during the period from July 15th to August 31st of each year.

And it is further agreed that the water rights so dedicated to the said lands shall be a part of and shall relate to water right belonging to the said Mullins Canal and Reservoir system; the terms of the deed dedicating the said water right to said land, together with all other contracts entered between the said party of the second part and the said purchasers, shall be based upon the provisions of this contract and shall not contain a waiver of any rights of the said purchaser of shares as are provided herein and in the act first mentioned in this contract, but all such deeds and contracts shall meet the approval of the said party of the first part, the State of Idaho.

Endorsed: Filed Oct. 29, 1915. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

EXHIBIT "D."

CONTRACT BETWEEN STATE BOARD OF
LAND COMMISSIONERS AND TWIN
FALLS LAND AND WATER COMPANY.

Dated January 2, 1903.

Contract.

This Agreement, made and entered into in duplicate this 2nd day of January, 1903, by and between the State of Idaho, the party of the first part, through the State Board of Land Commissioners of said State, said Board consisting of Frank W. Hunt, Governor, C. J. Bassett, Secretary of State, Frank Martin, Attorney General, and Permeal French, Superintendent of Public Instruction of said State, and the Twin Falls Land and Water Company, a corporation organized and existing under the laws of the State of Utah, the party of the second part, Witnesseth;

That, Whereas the party of the second part did heretofore, to-wit: on the 12th day of October, 1900, file with the State Board of Land Commissioners of the State of Idaho, a proposal for the construction of certain irrigation works in the counties of Cassia and Lincoln in the State of Idaho, under the provisions of the Act of Congress commonly known as the "Carey Act," and the acts amendatory thereof and the laws of the State of Idaho enacted in pursuance of the power granted by the said Act and, whereas at the request of the State of Idaho the lands lying under said irrigation works have been by contract

between the United States and the State of Idaho, dated July 1st, 1901, set apart by the United States in compliance with the provisions of said Act of Congress, said lands being List Numbered Six of the State of Idaho, filed at the United States Land Office at Hailey, Idaho, and more fully described in the contract above mentioned between the United States and the State of Idaho; and, whereas said State Board of Land Commissioners have duly notified the said party of the second part to enter into a formal contract for the construction of said irrigation works in pursuance of said proposal; said irrigation works being known as the Twin Falls Dam and Canals, and whereas said State Board of Land Commissioners did on the 2nd day of January, 1903, resolve to enter into a contract with the said party of the second part for the construction of said irrigation works, it is therefore mutually covenanted and agreed as follows:

Purpose of Contract.

First: That for and in consideration of the covenants of said party of the first part herein contained, the party of the second part agrees to construct and build the said Twin Falls Dam and Canals and their main laterals, beginning at the points of diversion particularly described and designated on the map descriptive of said canals and the lands herein described, which map is hereto attached and made part of this contract, marked Exhibit A, a copy of which is filed in the office of the State Engineer, and to sell shares or water rights in said canal system

from time to time as hereinafter provided, to the persons filing upon the lands hereafter described, and to the owners of other lands not described herein, but which are susceptible of irrigation from this canal system, said shares or water rights to be sold on the terms herein provided, and to transfer the ownership, management and control of said system to said purchasers of shares or water rights as hereinafter provided.

General Specifications for Construction.

Second: It is hereby agreed that the party of the second part shall construct the said Dam and Canals and Lateral system according to the following specifications:

The proposed point of diversion of the south side canal is situated north 30 degrees west 1329 feet from the southeast corner of Section 29, Township 10, South Range 21 East. The point of diversion of the north side canal is situated south 2 degrees 20 minutes west 2425 feet from the northeast corner of Section 29, Township 10, South Range 21 East.

General description of proposed works is as follows:

Dam: Water to be raised above its present level thirty-eight feet by closing the present three channels of the river by loose rock embankment or masonry or concrete dams, thereby forcing the water over two islands of solid lava rock, which will be blasted down to form a suitable crest and will give a free waterway of 815 feet. Rock embankment to be carried six feet above extreme high water, to have

a slope of 1:1 and to be backfilled with gravel or earth on slope 1 1-2:1.

South side canal: Total length about sixty-five miles. First section (from point of diversion to Rock Creek) eighty feet on the bottom, gradually narrowing to sixty feet on the bottom at Rock Creek. Slope of sides 2:1, depth of water ten feet, lower bank twelve feet on top; grade one foot to 5000 feet, capacity three thousand second feet. From Rock Creek to terminus bottom width gradually narrowed from sixty feet to fifteen feet, slopes 1 1-2:1, grades increased to two feet to 5000 feet at lower end. Rock work at head extends for one and one-half miles, estimated sixty per cent solid rock, balance of canal in earth until last twenty miles, where it is estimated fifty per cent of loose rock will be encountered.

North side canal: Total length about twenty miles. First section (being the first thirteen miles of the canal) twenty-five feet wide on the bottom, gradually narrowing to twenty feet at the end of thirteenth mile. Second section from end of thirteenth mile to terminus, gradually narrowing to ten feet in width at terminus. Slope of sides 1 1-2:1, depth of water 5 1-2 feet; grade 1 foot to 2640 feet, capacity 400 second feet. The first mile will be in heavy rock cuts, balance of canal in earth.

Structure: Both headgates will be built in solid rock. The main waste gates or spill ways will be located near the head of the canal in solid rock. All other waste gates, lateral gates and weirs will be of masonry or concrete.

Laterals: Approximately one hundred and twenty miles of main and three hundred and eighty miles of subordinate laterals are required with the necessary weirs and distributing gates. In case of variance between these specifications and Exhibit A, these specifications shall control.

Said dams, canals, laterals, gates, weirs and all other structures to be built and constructed in a workmanlike manner.

It shall be the duty of the said second party to file with the State Engineer of Idaho notes showing the size and the courses and distances from angle to angle of the canals and main laterals as soon as the same shall have been finally determined.

Changes may be made in these specifications from time to time by agreement between the State Engineer and said second party; such changes, however, not to impair the efficiency of the works for the purposes for which they are intended.

Said second party shall on demand of first party, furnish any further detailed specifications that may be required.

The main canals of this system shall have a carrying capacity when completed sufficient to deliver simultaneously one second foot of water to every eighty acres of land described in this contract, together with all other lands susceptible of irrigation from said canals as nearly as the same can be estimated and agreed upon between the State Engineer and the Engineers of the second party.

The plans, specifications and details for the construction of the dam, canals, headgates, weirs, etc., so far as the same are not covered by the above specifications, shall be submitted to the State Engineer of Idaho for his approval prior to the construction of any of said works, with the right of appeal by said second party from his decision to the State Board of Land Commissioners; but the work, when completed, shall be in accordance with the specifications as finally determined upon to the satisfaction of the State Engineer.

Right of Way.

Third: The said party of the first part hereby grants to the said party of the second part a right of way across lands belonging to the State of Idaho, or that may be ceded to the State, for the construction and operation of said canals and main laterals, which right of way shall be equal to the actual width of said canals or laterals at their base from toe to toe of the embankment of the same, together with a strip of land along one side of each canal or lateral, and adjacent thereto; said strip of land not to exceed fifty (50) feet in width along the main canal, thirty (30) feet in width along main laterals, and a proportionate width along smaller laterals.

Appropriation of Water.

Fourth: As there has been issued by the State Engineer to the party of the second part a permit to construct said irrigation works and to divert and appropriate from the waters of Snake River 3400

second feet for the purpose of irrigation, power and other beneficial uses, said permit being dated October 8th, 1900, the said party of the second part agrees to cause to be furnished and delivered to said canals all of said appropriated waters to irrigate and reclaim such portions of the following described lands, together with such portions of other lands not described herein, but which lie below the line of said canal, as are susceptible of irrigation and reclamation therefrom, and said second party hereby covenants and agrees that it has not done, suffered or permitted any act or thing by reason whereof the appropriation so made by it as aforesaid of the said waters of Snake River for the purposes of the irrigation and reclamation of lands through the system of works to be constructed hereunder has been or in future may be in any way impeached, clouded or impaired.

Entry of Lands.

Fifth: Upon the execution of this contract and when the actual construction of said canal shall have been inaugurated, and so far completed as to insure that said water will be furnished the hereinafter described lands, the State Board of Land Commissioners shall cause to be opened for settlement as provided by law, the following described portion or parcels of the land herein described, to-wit:

All of that portion of said lands on the southerly side of Snake River under said canal system that is shown on the map Exhibit A herewith, lying to

the east and south of the east line of section sixteen (16), township nine (9), south range nineteen (19) east, Boise Meridian.

Also all of the said lands on the northerly side the Snake River under said canal system as shown on said map Exhibit A.

That when said canal on the southerly side of Snake River shall have been completed to a point twenty (20) miles, measured along its course from the dam and head of said canal, then the State Board of Land Commissioners shall cause to be opened for settlement in like manner the following described lands, to-wit:

All of said lands under said canal lying to the east of the west boundary of township ten (10) and eleven (11) south of range seventeen (17) east of Boise Meridian as shown on the map Exhibit A.

And when said canal on the southerly side of Snake River shall have been completed to a point thirty (30) miles, measured along the canal from the head thereof, then the remaining portion or parcels of said land shall be thrown open for settlement in the manner provided by law.

Application for Lands.

Sixth: The said party of the first part, through its State Board of Land Commissioners, agrees that it will not approve any application for or filing on said lands until the person or persons so applying shall furnish to the said Board a true copy of the contract entered into with the said party of the

second part for the purchase of sufficient shares or water rights in said irrigation works, or shares of stock in the corporation owning, controlling and managing the same for the irrigation of the lands applied for. The second party stipulates and agrees that to the extent of the capacity of the irrigation works, and as rapidly as lands are opened for entry and settlement, it will sell, or contract to sell, water rights or shares for lands to be filed upon to qualified entrymen or purchasers, without preference or partiality other than that based upon priority of application.

Sale of Land by the State.

Seventh: That the said party of the first part, acting through its State Board of Land Commissioners, agrees to sell the lands herein described to such persons as are or will be, by law entitled to file upon the same, for the sum of Fifty (50) Cents per acre, one-half of which shall be paid at the time of application for the entry of such land made to said Board and the remaining one-half at the time of making final proof on the land, as required by law.

Price of Water Rights.

Eighth: Said party of the second part further agrees and undertakes that it will sell or cause to be sold to the person or persons filing upon any of the lands herein described or to the owner of other lands not described herein, but susceptible of irrigation from its said canal system, by good and sufficient contract of sale with right of possession and enjoyment by the purchaser pending its fulfillment, a water

right or share in the said canal for each and every acre owned, filed upon or purchased from the State.

Each of said shares or water rights shall represent a carrying capacity in said canal sufficient to deliver water at the rate of one-eightieth of one second foot per acre, and each share or water right sold or contracted as herein provided shall also represent a proportionate interest in the said canal, together with all rights and franchises based upon the number of shares finally sold in the said canals.

Such water rights or shares shall be sold to the person or persons aforesaid as follows: To the person or persons filing upon any of the lands herein described at a price not exceeding \$25.00 per share, the same to be paid for as follows: One-fifth in cash at the time of sale and the remainder in five annual installments bearing interest at the rate of six per cent per annum; to the person or persons purchasing any portion of sections numbered sixteen or thirty-six, or any other lands belonging to the State of Idaho which are susceptible of irrigation and reclamation from this canal and to which such water rights are to be applied and dedicated at a price not exceeding fifteen and 50-100 (\$15.50) dollars per share, provided said water rights are purchased within one year after date of sale or contract by the State of Idaho, and not exceeding Twenty-five (\$25.00) dollars at any time thereafter; and to the person or persons owning other lands not herein described but susceptible of irrigation and reclamation from this canal, and to which said water rights or shares

are to be applied or dedicated at a price not exceeding Twenty-five (\$25.00) dollars per share, payment in either case to be made therefor in installments upon interest as hereinbefore provided in the case of other lands.

This agreement shall not, however, be construed to prevent the sale of shares or water rights to purchasers on terms more favorable than those hereinbefore provided, or to prevent payment of installments or purchase price in advance of the maturity of the same at the option of the purchaser.

But in no case will water rights or shares be dedicated to any of the lands aforementioned or sold beyond the carrying capacity of the canal system, nor in excess of the appropriation of the waters as hereinbefore mentioned.

It is expressly agreed that prior to the time when the said water rights or shares shall have been converted into or replaced by shares of stock of the Twin Falls Canal Company, Limited, a corporation to be formed as hereinafter provided, said water rights or shares in this section referred to shall be understood to represent only a right to the use and enjoyment of the water flowing through or supplied by the canal system, and shall not in any case be held or understood to transfer to or vest in the purchaser thereof a right of ownership in the dam or rights of way, canals, headgates, weirs or other irrigation works, or the right to interfere or participate in the control or management thereof as against the said second party.

It is further stipulated and agreed that any and all contracts upon which water rights or shares in the canal are sold, may by express agreement, provide that upon full payment of the purchase price there shall be given at the option of the second party hereto either a warranty deed for an undivided interest in the canal system or shares in the Twin Falls Canal Company, Limited, hereafter described, one share of stock for one share of water right.

Whereas, it is determined to be necessary to provide a convenient method of transferring the ownership and control of said canal from the said party of the second part herein to the purchasers of shares or water rights in said canals, and of determining their rights among themselves and between said purchasers and the party of the second part herein, and for the purpose of levying and collecting reasonable tolls, charges and assessments for the care and maintenance of said canals, it is further hereby provided that at any time after the completion of the entire system of dam and canals as hereinbefore provided in the specifications and within seven (7) years from the date of this contract, or at any time prior thereto, upon the consent of the State Board of Land Commissioners, a corporation shall be formed under the laws of the State of Idaho, to be known and called the Twin Falls Canal Company, Limited, having the powers and limitations and with the mutual covenants and agreements substantially as set forth in the draft of the Articles of Incorporation hereunto attached marked Exhibit B. "But said Articles of

Incorporation must conform to the provisions of this contract, and must be approved by the State Board of Land Commissioners before said corporation can be formed." The said corporation shall be formed by said second party at its expense, all the stock thereof being subscribed by the second party and such other persons, not exceeding six, as may be necessary and all the stock being subscribed by or for said second party. And immediately upon the formation of said corporation said second party shall by good and sufficient deed convey to it the dam and entire system of canals, and the dam and irrigation works and the water rights connected therewith, free of all debt, lien or encumbrance. And upon the formation of said corporation, the shares or water rights theretofore sold or contracted to be sold shall be converted into or replaced by the shares of said corporation, share for share, and from and after the date of the formation of said corporation the party of the second part shall sell to purchasers or owners of lands under the canal system shares of stock of said corporation upon the same terms in all respects as hereinbefore provided for the sale of water rights or shares prior to the formation of such corporation. The said second party agrees that until it shall have assigned and transferred to settlers and owners of lands under said canal a majority of the stock of the Twin Falls Canal Company, Limited, and thereafter so long as it shall manage and control the said canal system there shall be delivered through the canals and laterals the water flowing therein equally

and proportionately according to the representative rights of the parties entitled thereto.

Any and all deferred payments for the purchase price of water rights or shares of stock may be secured by express contract of the purchaser pledging the water right or stock sold together with any and all rights in the lands to which the water is to be applied and the lien thereby granted shall be in addition to all liens granted by the laws of Idaho.

Water Right Dedicated.

Ninth: The certificates of sale of water rights and the certificates of shares of stock of the Twin Falls Canal Company, Limited, shall each upon being issued to the purchaser or holder of land under the canal system, be made to indicate and define in the contract or certificate, as the case may be, the amount of water, to-wit: One-eightieth of a second foot allotted to each acre represented thereby, and carrying capacity of the canal sufficient therefor, the water to be delivered from the canal during each and every irrigation season, said amount to be measured at or within one-half mile of the place of intended use in such quantities and at such times as the condition of the soil, crops and weather may determine, but according to such rules and regulations based upon a system of distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from this canal system. It is agreed that said system of distribution by rotation shall be devised by the said party of the second part and used by it during the

period while it retains the management of said system, and that it shall meet the approval of the State Engineer.

The sale or contract of the water right to the purchaser shall be a dedication of the water to the land to which the same is to be applied, and the water right so dedicated shall be a part of and shall relate to the water right belonging to the said system of canals.

All deeds for water rights, if any be issued by the said second party, shall be based upon this contract, and shall meet the approval of the said party of the first part, the State of Idaho.

Measurement of Water Charges for Delivery.

Tenth: The said party of the second part agrees to construct and until it shall convey and turn over the title and possession to the Twin Falls Canal Company, Limited, to operate said canal and main laterals so that water conducted through the same may be delivered at a point not exceeding one-half mile from any legal subdivision of one hundred and sixty acres of land herein described, filed upon, owned or occupied as aforesaid and to be irrigated or reclaimed by the water conducted through said canals and main laterals. That it will construct and place in position and while it retains possession, maintain all headgates, flumes, weirs and other devices through which water may be turned off from said canal or main laterals; that the said party of the second part will construct and place in said canal or laterals such devices for measuring water to irriga-

tors as shall be deemed necessary and best by the State Engineer of Idaho.

It is hereby agreed that every purchaser of shares in said canal or holder of stock in said Twin Falls Canal Company, Limited, shall be entitled to have delivered for the irrigation of his land, its full amount of water as herein provided, and it is hereby stipulated and agreed that while it retains possession and control of said canal system the party of the second part may make a charge for the delivery of said water for irrigation to the purchaser of said shares on the following basis and in the following manner: All of the water dedicated to his land shall be delivered free of charges during the first irrigating season that water is delivered to said purchaser, and thereafter an annual charge not to exceed 80 cents per acre may be made for each and every acre irrigated, or at the option of the purchaser, a charge not to exceed 20 cents per acre foot may be made for each and every acre foot delivered by the second party at the request of such purchaser.

Increase of Capacity of Canal.

Eleventh: The party of the second part shall be entitled at any time within five years from the date hereof to increase the appropriation of water from Snake River at the said dam hereinbefore described, to increase the capacity of said canals or either of them or any lateral thereof, and to use the same so enlarged or increased for the purpose of carrying any water belonging to the said party of the second part under such additional appropriation, provided,

however, that such use shall be allowed only upon the making of such reasonable arrangements as to the expense of and care and maintenance of the canals and irrigation system, as may be agreed upon between the said party of the second part and the said Twin Falls Canal Company, Limited, whenever said last named company shall take possession of the canal system and as shall be approved by said party of the first part.

Any rights acquired by the party of the second part under the provisions of this section shall be at all times held, used and enjoyed subject and subordinate to the rights of the purchasers of water rights for the irrigation of lands are provided in this contract.

It is further agreed that the said party of the second part, for the purpose of raising funds to construct the said canal system, may execute a mortgage or deed of trust upon all its rights which it has or may hereafter acquire by virtue of this contract to any third party, provided that such mortgage or deed of trust shall contain a clause requiring the trustee or mortgagee, as the case may be, upon the payment to such mortgagee or trustee of the amount stipulated to be paid by any payments upon water rights are to be made to the trustee or mortgagee, if any, but trustee or mortgagee may consent otherwise.

Transfer of the Management and Control of Said Canal System to Purchasers of Shares.

Twelfth: Said party of the second part covenants

and agrees that until such time as the majority of the shares of the Twin Falls Canal Company, Limited, shall have been conveyed and transferred to the owners and holders of the land under said canal system, it will cause to be maintained, operated and kept in good repair the said canals and irrigation system, and that if at any time during said period, the proper revenue, tolls, and income of the said Twin Falls Canal Company, Limited, shall be insufficient for the purpose of maintaining, operating and keeping in repair, the said canals and irrigation system, and that if at any time during said period, the proper revenue, tolls, and income to the said Twin Falls Canal Company, Limited, shall be sufficient for the purpose of maintaining, operating and keeping in repair all the irrigation works hereinbefore referred to, it will, at its own expense, and without cost or charge to the said Twin Falls Canal Company, Limited, supply to the treasury of the said last named corporation the funds necessary to supply such deficiency.

Completion of the Canal System.

Thirteenth: Said party of the second part agrees to begin work on said dam and canals and irrigation system within six months from the date of this contract, and that at least one-tenth of the purchasers of water rights to thereupon give a full release to such purchaser for the amount of the water rights so purchased by him; such mortgage or deed of trust to be subject to the terms and conditions of this contract and receive the approval of the Attorney Gen-

eral of the State of Idaho. All construction work shall be completed within two years from the date hereof, that the construction of said works shall be prosecuted diligently and continuously to completion, and that a cessation of work after the second year without the sanction of said Board will forfeit to the State all rights under this contract, and second party further agrees to have said canal system fully constructed and in operation in accordance with this contract on or before five years from the date of this contract. It is understood and agreed that upon completion of the dam hereinbefore provided, and upon the completion of any such portion or portions of the said canal and laterals as may be conveniently operated by said Twin Falls Canal Company, Limited, said party of the second part will, upon the completion of said portion or portions of the canal or canals or laterals and in advance of the completion of the entire canal system, turn over and deliver possession of such completed portion to the said Twin Falls Canal Company, Limited, provided said last named company shall with the consent of the State Board of Land Commissioners be organized prior to the completion of the canal, to the end that as rapidly as may be, the operation, maintenance and control of the said canal and irrigation system may be placed under the control and in the possession of said last named company.

Forfeiture.

Fourteenth: The said party of the second part agrees that upon the failure on its part to begin the

construction of the said canal within the time specified in this contract, or upon the failure to proceed with the work, as agreed upon in this contract, after receiving sixty days' notice from the Secretary of the State Board of Land Commissioners, the bond given to secure the strict performance of the agreement herein contained, together with any portion or portions of said canal that may have been constructed under the conditions of the contract, shall be at once forfeited to the said party of the first part, the State of Idaho, and that the said party of the first part, acting through its said Board of Land Commissioners, may declare the same forfeited and proceed to enforce said bond and to take possession of said canal and irrigation works, and all the rights the said party may have acquired therein, as provided in the Act of the Legislature of the State of Idaho first referred to in this contract.

Estimated Cost.

Fifteenth: The estimated cost of the proposed irrigation works is One Million Five Hundred Thousand (\$1,500,000.00) Dollars. It is understood and agreed that the existing law under which this contract is executed is as much a part of this contract as if specifically herein set forth.

Description of Lands.

Sixteenth: The lands hereinbefore referred to being the lands donated by Act of Congress to the State of Idaho under and pursuant to the Act approved August 18th, 1894, commonly called the "Carey Act," the reclamation and irrigation of

which lands this contract is especially designed to effect, are duly set forth and described in a list hereunto attached and made part of this contract marked Exhibit C.

In witness whereof, the said party of the first part, the State of Idaho, has by resolution of its State Board of Land Commissioners caused this agreement to be signed in duplicate by its Governor, attested by its Secretary of State, and the Great Seal of said State to be affixed hereto, and the said party of the second part has hereunto caused its corporated name to be attached by its President and attested by its Secretary, and its corporate name to be attached by its President and attested by its Secretary, and its corporate seal to be affixed, as well as on the duplicate hereof, the day and year first above written.

For the State of Idaho,

(Seal) By F. W. HUNT, Governor.

Attest: CHAS. J. BASSETT,
Secretary of State.

THE TWIN FALLS LAND AND WATER
COMPANY,

(Seal) By S. B. MILNER, President.

Attest: HARRISON E. JENKINS,
Secretary.

Boise, Idaho, March 29, 1911.

County of Ada,
State of Idaho,—ss.

I, N. Jenness, Register of the State Board of Land Commissioners of the State of Idaho, do hereby certify that the foregoing and hereto attached instru-

ment is a true and correct copy of the contract between the State of Idaho and the Twin Falls Land and Water Company, as same appears of record and on file in my office.

In witness whereof, I have hereunto set my hand and official seal this 29th day of March, 1911.

N. JENNESS, Register.

Endorsed: Filed Oct. 29, 1915. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

EXHIBIT "E."

AGREEMENT BETWEEN THE STATE OF
IDAHO AND TWIN FALLS NORTH SIDE
LAND AND WATER COMPANY.

THIS AGREEMENT, Made and entered into, in duplicate, this 15th day of April, 1907, by and between the STATE OF IDAHO, the party of the first part, through the State Board of Land Commissioners of said State, said Board consisting of Frank N. Gooding, Governor, Robert Lansdon, Secretary of State, John J. Guheen, Attorney General, and S. Belle Chamberlain, Superintendent of Public Instruction of said State, and the TWIN FALLS NORTH SIDE LAND AND WATER COMPANY, a corporation organized and existing under the laws of the State of Delaware and duly authorized to do business in the State of Idaho, the party of the second part, WITNESSETH:

THAT WHEREAS The party of the second part had succeeded to all the rights in the Twin Falls Land and Water Company (a Utah Corporation), for the

irrigation of lands in Lincoln County, State of Idaho, which rights are evidenced by that certain contract between the State of Idaho and the Twin Falls Land and Water Company, dated January 2, 1903, and by the proposal and request of said Twin Falls Land and Water Company, filed on the 24th day of December, 1906, with this Board, which said proposal and request were approved by this Board on the 27th day of December, 1906, all of which may be more specifically described as the right to the irrigation of thirty thousand (30,000) acres of land, hereinafter known as the First Segregation, on the north side of Snake River in Lincoln County, Idaho, which lands are described in the contract, heretofore mentioned, of the 2nd day of January, 1903, and also the right to the irrigation of one hundred and fifty-five thousand and two hundred eighty-one and forty-three hundredths (155,281.43) acres of land situated in said Lincoln County under the line of the canal of the Twin Falls Land and Water Company as extended from First Segregation, which said last mentioned lands are hereinafter known as the Second Segregation, being List No. 13 of the State of Idaho filed in the United States Land Office at Hailey, Idaho.

AND WHEREAS All of the property, rights, and franchises of said Twin Falls Land and Water Company, in Lincoln County, State of Idaho, together with a proportionate interest in the dam of said Company at Milner, Idaho, have by the consent of the said Board of Land Commissioners been duly transferred to the party of the second part herein.

AND WHEREAS the lands lying under said proposed irrigation works and included in the premises known as the First Segregation and the State of Idaho, dated July 1, 1901, set apart by the United States in compliance with the provisions of an Act of Congress, commonly known as the Carey Act, said lands being a portion of the lands described in the list numbered six (6) of the State of Idaho filed in the United States Land Office, at Hailey, Idaho, all of which are situated in Lincoln County, Idaho, a detailed list of which lands are hereto attached, made a part hereof and marked "Exhibit A."

AND WHEREAS, the first and second parties hereto deem it advisable to begin the work of reclaiming said lands without awaiting the approval of the remainder of the segregation, and agree to enter into a formal contract for said purpose, the same to become a part of the contract to be entered into for the reclamation of the remainder of said lands applied for.

IT IS MUTUALLY COVENANTED AND AGREED as follows:

Purposes of the Contract.

1. That for and in consideration of the covenants of said party of the first part herein contained the party of the second part agrees to construct and build said canal and irrigation system, beginning at the point of diversion at the Milner Dam, on the north side of Snake River, in said Lincoln County, at the point hereinafter described, and designated on the map of said canals marked "Exhibit A," and

filed with the proposal and request herein on the 24th day of December, 1906, and which map is hereby referred to and made a part of this contract; and including also a distributing system from said canal; and to sell shares or water rights in said canal system from time to time, as hereinafter provided, to the persons filing upon the lands hereinafter described, and also to the owners of other lands not described herein but which are susceptible of irrigation from this canal system, said shares or water rights to be sold on the terms hereinafter provided, and to transfer the ownership, management and control of said canal system to the said purchasers of shares or water rights as hereinafter provided.

General Specifications for Construction of Twin Falls North Side Canal.

(First Segregation.)

2. It is hereby agreed that the party of the second part shall construct, beginning at the north end of Milner Dam, in Lincoln County, three (3) more gates of the same design as the two gates which are at present constructed at this place, plans of which are hereby submitted; these gates to control the water from Snake River into the Canal and to be the diversion for the irrigation project herewith contracted for.

The proposed diversion is designated as Sta. 0-00 at a point on line between Sections 28 and 29 Twp. 10 S. R. 21 E., from which the corner to Sections 20, 21, 28 and 29 bears north 2364.8 ft. distant. From this

point the canal extends in a westerly direction and is more fully described in the field notes on file in the State Engineer's Office at Boise and in the United States Land Office at Hailey.

General Description of Canal.

The canal covering the First and Second Segregations is approximately 340,000 feet long, extending from the Milner Dam on Snake River, near the town of Milner, approximately to the Malade River, through Twp. S. R. 20 and 21 E., Twp. 9 S. Rgs. 19 and 20 E., Twp. 8 S., Rgs. 17, 18 and 19 E., Twp. 7 S., Rgs. 15, 16, 17 and 18 E. and Twp. 6 S., Rgs. 14 and 15 E. The Canal to carry 1800 second feet of water for a distance of four miles to station 206. (These stations are 100 feet long). This is four miles from the Milner Dam extending to a draw which empties into Wilson Lake Reservoir.

The canal is to be built of earth, rock and concrete, with $7\frac{1}{2}$ feet depth of water.

Where canal is in earth section it is to have banks with slopes of 2 to 1 on the inside and $1\frac{1}{2}$ to 1 on the outside. The top to have a width of 8 feet. The canal in earth to have a grade of 0.03 feet for 100 feet. A general width of 55 ft. on the bottom. The slopes in earth cuts to be 2 to 1 below high water line and 1 to 1 above high water line.

Rock sections to have a slope to $\frac{1}{4}$ to 1, the width of the bottom to be 40 feet and a grade of 0.01 feet to the 100 feet.

At the end of the fourth mile laterals of the fol-

lowing dimensions; as shown on plat filed in the office of the State Engineer and with the same Board of Land Commissioners.

LATERAL NO. 1.

17,300 feet canal.

Base 16 feet; slope 2 to 1.

4.5 feet water depth.

6.0 feet to top of bank.

315 cu. ft. per sec. carrying capacity.

Crown of bank 3 feet.

19,500 feet canal.

Base 15 feet; slope 2 to 1.

4.5 feet depth of water.

6.0 feet to top of bank.

285 cu. feet per sec. carrying capacity.

Crown of bank 3 feet.

13,400 feet canal.

Base 14 feet; slope 2 to 1.

4.3 feet depth of water.

5.8 to top of bank.

Crown of bank 3 feet.

250 cu. ft. per sec. carrying capacity.

23,200 feet of canal.

Base 13 feet; slope 2 to 1.

4.0 feet depth of water.

5.5 feet to top of bank.

Crown of bank 3 feet.

225 cu. feet per sec. carrying capacity.

16,700 feet canal.

Base 10 feet; slope 2 to 1.

5.5 feet to top of bank.

Crown of bank 3 feet.

165 cu. feet per sec. carrying capacity.

4.0 feet depth of water.

9,000 feet of canal.

Base 10 feet; slope 2 to 1.

2.8 feet depth of water.

3.8 feet to top of bank.

80 cu. feet per sec. carrying capacity.

8,000 feet of canal.

Base 10 feet; slope 2 to 1.

2.5 feet depth of water.

3.5 feet to top of bank.

Crown of bank 3 feet.

65 cu. feet per sec. carrying capacity.

LATERAL NO. 2.

15,000 feet canal.

Base 10 feet; slope 2 to 1.

1.9 feet depth of water.

2.9 feet to top of bank.

Crown of bank 3 feet.

35 cu. ft. per sec. carrying capacity.

LATERAL NO. 3.

13,600 feet canal.

Base 4 feet; slope 2 to 1.

2.0 feet depth of water.

3.0 feet to top of bank.
Crown of bank 3 feet.
25 cu. ft. per sec. carrying capacity.

LATERAL NO. 4.

7,000 feet canal.
Base 4 feet; slope 2 to 1.
2.0 feet depth of water.
3.0 feet to top of bank.
Crown of bank 3 feet.
25 cu. feet per sec. carrying capacity.

LATERAL NO. 5.

24,000 feet canal.
Base 10 feet; slope 2 to 1.
1.9 feet depth of water.
2.9 feet to top of bank.
Crown of bank 3 feet.
35 cu. feet per sec. carrying capacity.

35,000 feet canal.
Base 4 feet; slope 2 to 1.
2.0 feet depth of water.
3.0 feet to top of bank.
Crown of bank 3 feet.
25 cu. feet per sec. carrying capacity.

LATERAL NO. 6.

37,400 feet canal.
Base 4 feet; slope 2 to 1.
2.0 feet depth of water.
3.0 feet to top of bank.

Crown of bank 3 feet.

25 cu. feet per sec. carrying capacity.

SUB LATERALS.

14 miles.

Base 4 feet; slope 2 to 1.

1 foot cut. Earth put into banks.

On all laterals cut to make banks.

The laterals are to be built to cover Carey lands in parts of Twp. 10 S. Rgs. 18, 19, 20, 21 East and Twp. 9 S., Rgs. 18, 19, 20 and 21 E., taken under the segregation of the South Side Canal, lying north of Snake River.

At the end of the fourth mile the remainder of the water will be turned into a natural channel through drop and waste gates and will run for a distance of about five miles and accumulate in Wilson's Lake Reservoir, which will be formed by three dams, to be built of puddled earth and rock.

(Second Segregation.)

This lake will be converted into a storage reservoir to conserve 60,000 acre feet of water by raising the water surface of the Lake 50 feet to the height of 4010 feet. This will require one dam of puddled earth 50 feet high at the highest point and 1200 feet long. Another dam 32 feet high in the deepest place and 5500 feet long. Another dam two miles long of an average height of ten feet. These dams to have an inside slope of 3 to 1 and outside slope of 2 to 1; the canal to have an outlet in solid rock with head gates to let the water into the canal below Wilson's

Lake at an elevation of 3960 feet. At this point, which is on the East side of Section 24, Twp. 8 S. R. 19 E., the water is to be taken out of Wilson's Lake Reservoir from the bottom of tunnel and gates and canal, which will have a capacity of 1500 second feet, the canal to extend in a northeasterly direction to the Northeast quarter of Section 8 Twp. 8 S. R. 18 E. and to be emptied into what is known as Sugar Loaf Reservoir.

This reservoir is designed to hold 20,000 acre feet of water, to be used as a storage reservoir. The reservoir to be formed by building two dams of earth and rock with a 3 to 1 slope on the inside of the dam and a 2 to 1 slope on the outside of the dam with an 8 foot width on top. The heavy parts of this earth dam will be puddled. The size of the dam is to be about $2\frac{1}{2}$ miles in length, of which $1\frac{1}{2}$ miles is to average five feet in height and $\frac{3}{4}$ of a mile to have an average height of 18 feet. The second dam is to be about $1\frac{1}{2}$ miles long with an average height of 7 feet. At the end of the last described canal in Sec. 8, Twp. 8 S. T. 18 E., a canal will be constructed running around Sugar Loaf Butte, which will have a carrying capacity of 820 second feet of water. About two miles out from the head of this canal a division will be made and two canals, one continuing East and South with 480 second feet capacity, and the other West and South with 340 second feet capacity around Sugar Loaf Butte to a point in Sec. 20 Twp. 8 S. R. 17 E. From these canals the main coulees will be used to cover the land. From these coulees other

small laterals will be constructed to cover from the first canal, running East of Sugar Loaf Butte, about 60 sections of land, described as follows:

All the Carey Act lands in Twp. 8 S. R. 18 E. Twp. 9 S. R. 18 E. Also fractional Twps. 9 S. Rgs. 15, 16 and 17 E. and South portions of Twps. 8 S. R. 16 and 17 E. The canal running around the West side of Sugar Loaf Butte to cover about 37 sections, as follows:

The North part of Twp. 8 S. R. 17 E. and part of Sections 1, 2, 9, 10, 17 18, 25 and all of Sections 11, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23 and 24 of Twp. 8 S. R. 16 E. Parts of Sections 24, 26, 27, 31, 35, 36 and all of Sections 25, 32, 33, 34 of Twp. 8 S. R. 15 E. Parts of Sections 33, 34, 35, 36 of Twp. 8 S. R. 14 E. From Sugar Loaf Reservoir an opening will be made with gates into the main canal again, continuing through Sections 36, 35, 34 and 27 with a canal which will have a capacity of 780 second feet to Section 27 Twp. 7 S. R. 17 E. To cover the balance of the land and in Section 27 the canal to be reduced, part of the water to be emptied into a natural course to cover 67 sections of lands as follows:

Part of Sections 27, 28, 31, 32, 33, 34, Twp. 7 S. R. 17 E. Part of Sections 1, 2, 3, 4, 5, 6, 9, 11, Twp. 8 S. R. 16 E. All of 7 and 8 of Twp. 8 S. R. 16 E. Part of 32, 33, 36 Twp. 7 S. R. 16 E. Part of Sections 1, 2, 3, 4, 24, 26, 27, 28, and all of 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 29 and 30, Twp. 8 S. R. 15 E. Part of Sections 29, 30, 33, and all of 31, 32, of Twp. 7 S. R. 15 E. All

of Sections 5, 6, 7, 8, 17, 18, 19, 20, 21, 26, 27, 28, 29, 30, 32, 33, 34, 35 and 36. Part of Sections 9, 16, 22, 23, 24 and 25, Twp. 7 S. R. 14 E. Part of 1 and 12 Twp. 7 S. R. 13 E. All of 1 to 17, inclusive, 21 to 27 inclusive and part of 28, 34, 35, 36, Twp. 8 S. R. 14 E. The balance of the segregation, about 14,000 acres, to be covered from a small lateral leading off the main canal at Section 27. Twp. 7 S. R. 17 E., to cover Carey Act lands in Twp. 7 S. R. 14, 15, 16, 17 and 18, Twp. 6 S. Rgs. 13 and 14 E. of the Boise Meridian.

This Canal System to be surveyed and laterals to be determined by topographical survey which is to be made and platted so that a contour of the ground can be definitely shown. The size of laterals to be determined from the lay of the ground, the amount of the land governing the size of the laterals for each district by projecting lines on this plat and laying them out on the ground in conformity with the plat. This Plat and System of Laterals to be submitted to the State Engineer for approval from time to time as the surveys are made. Coulees and draws are to be utilized as water ways when convenient. Openings in the main canal are to be of concrete. Changes in these plans and specifications may be made with the consent of the State Engineer.

Right of Way.

3. The said party of the first part grants to the said party of the second part a right of way across all lands belonging to the State of Idaho, or that may

be ceded to the State by virtue of the Act of Congress commonly known as the Carey Act, or by any other laws for the construction and operation of said canals, reservoirs and the distributing system therefrom and the necessary waste ditches, which right of way shall be equal to the actual width of the canal, lateral or waste ditch at its base, from toe to toe of the embankment, together with a strip of land along one side of such canal, lateral or waste ditch, and adjacent thereto, not to exceed 50 feet in width along the Main canal, 30 feet in width along the laterals leading from said Main Canal, and a proportionate width along the smaller laterals and waste ditches; said right of way to be located as designated by the Chief Engineer of the party of the second part, and approved by the State Engineer, and in all cases to be sufficient for ingress and egress along said canal, lateral or waste ditch, in proportion as the necessity therefor exists, and all water users on lands irrigated from said canals or laterals shall have such right of way as may be necessary from the second party's canal or laterals to their own land in order to construct and maintain the necessary service ditches for their own use, and such right of way across said lands as may be necessary for waste ditches. No reservoirs, however, shall be constructed under this provision of this contract upon any portion of Sections Sixteen (16) or thirty-six (36), without making compensation and complying with the laws of the State governing that subject. No more laterals, service or waste ditches shall be constructed across any premises than are necessary, in

the opinion of the Chief Engineer of the company and the State Engineer to properly irrigate the land so intended to be irrigated from such ditches and to carry away the waste water therefrom.

The laterals, service and waste ditches shall be constructed under the direction of the Chief Engineer of the Company, and subject to his approval and the approval of the State Engineer. In case any land owner is dissatisfied with the location of any service ditch across his premises he shall have the right to appeal to the State Board of Land Commissioners, whose decisions shall be final. Detail maps showing the location of reservoirs, laterals and waste ditches constructed by the second party shall be filed with the Board and with the State Engineer, but such filing need not be made prior to the lands being thrown open for settlement.

Appropriation of Water.

4. WHEREAS the Twin Falls Land and Water Company, the predecessor in interest of the second party herein, did on the 11th day of October, 1900, duly appropriate four hundred (400) cubic feet per second of the waters of Snake River to be taken from said river in the north side thereof at what is now known as the Milner Dam, and whereas the said predecessor of second party procured Permit No. 1603 to be issued by the State Engineer of Idaho and approved October 14, 1905, said permit being for the diversion of 2250 cubic feet per second of the waters of Snake River to be taken from Snake River on the north side thereof at the same Milner Dam,

and whereas second party has acquired the water appropriation of I. B. Perrine dated June 25th, 1900, said appropriation being recorded in Book One of water rights at page 229 of the records of Lincoln County, Idaho, which said appropriation is for 3,000 cubic feet per second of the waters of Snake River to be taken from said river at the point where the Milner Dam is now located.

NOW THEREFORE, The said party of the second part agrees to furnish and deliver to said canal and to the owners of shares therein, as specified in the other provisions of this contract, all of said appropriated waters to which said second party may be entitled, to the extent of one-eightieth (1-80) of one (1) cubic foot per second of time per acre, said waters to be furnished for the reclamation of the lands hereinafter described together with any other lands not described herein which are so situated as to be susceptible of irrigation and reclamation from said canal system.

And the said second party hereby covenants and agrees that it has not done, suffered or permitted on its part any act or thing by reason whereof the appropriation so made of the said waters of Snake River for the purpose of the irrigation and reclamation of lands through the system of works to be constructed hereunder, has been or in future may be in any way impeached, clouded or impaired.

Entry of Lands.

5. Upon the execution of this contract and when the actual construction of said canal have been in-

augurated, the party of the first part will, by notice given in conformity of law, throw open the herein-after described lands for settlement under such regulations as to the manner of said opening as shall be prescribed by the State Board of Land Commissioners.

(Notice has already been given of opening of First Segregation).

Application for Lands.

6. The said party of the first part, through its State Board of Land Commissioners, agrees that it will not approve any application for or filing on the lands hereinafter described until the person or persons so applying shall furnish to the said Board a true copy of the contract entered into with the party of the second part for the purchase of sufficient shares of water rights in said irrigation works for the irrigation of said lands, said shares or water rights to be evidenced by the stock of the North Side Canal Company, Limited, as hereinafter provided.

The second party stipulates and agrees that to the extent of the capacity of the irrigation works and to the extent of its water rights, as rapidly as lands are open for entry and settlement, it will sell or contract to sell water rights or shares for land to be filed upon to qualified entrymen or purchasers without preference or partiality, other than that based upon priority of application, it being understood however that priority of application or priority of entry or settlement shall not give any priority of right to the use of water flowing through the canal as against subse-

quent purchasers, but shall entitle the purchaser to a proportionate interest only therein, the water rights having been taken for the benefit of the entire tract of land to be irrigated from the system. The priority of the application upon the opening days shall be determined by a system of drawing under the direction of the State Board of Land Commissioners.

Sale of Land by the State.

7. That the said party of the first part, acting through its State Board of Land Commissioners, agrees to sell the lands herein described to such persons as are or may be by law entitled to file upon the same, for the sum of fifty cents (\$0.50) per acre, half of which sum shall be paid at the time of application for the entry of such land made to said Board, and the remaining one-half at the time of making final proof thereon.

Price of Water Rights.

8. Said party of the second part further agrees and undertakes that it will sell or cause to be sold to the person or persons filing upon any of the lands herein described, or to the owner of other lands not described herein but which are or may be susceptible of irrigation from its canal system, by good and sufficient contract of sale with right of possession and enjoyment by the purchaser pending its fulfillment, a water right or share in said canal for each and every acre filed upon or purchased from the State or acquired from the United States. Each of said shares or water rights shall represent a carrying

capacity in said canal sufficient to deliver water at the rate of one-eightieth (1-80) of one (1) second foot per acre, and each share of water right sold or contracted, as herein provided, shall also represent a proportionate interest in said canal and irrigation works, together with all rights and franchises therein, based upon the number of shares finally sold in said canal. Said canal, however, to be built in accordance with the plans heretofore filed with the Board, which canal, according to said plans, has been determined by the State Engineer to have the carrying capacity hereinbefore mentioned. Such water rights or shares shall be sold to the person or persons aforesaid for lands under or adjacent to the First Segregation or included therein as follows:

To the person or persons filing upon any of said lands at a price not exceeding thirty dollars (\$30) per share, except as hereinafter provided, the same to be paid for as follows:

One-fifth (1-5) in cash at the time of the sale, and the remainder in five equal annual installments, bearing interest at the rate of six per cent. (6%) per annum, payable annually; to the person or persons purchasing any portions of sections numbered Sixteen (16) or thirty-six (36), or any other lands belonging to the State of Idaho and within the exterior limits of said First Segregation, and which are susceptible of irrigation and reclamation from this canal, at a price not to exceed \$20 per share. PROVIDED said water rights are purchased within one year after the purchase of the lands from the

State, and not exceeding \$30 at any time thereafter. Said payments upon said State lands to be made one-seventh (1-7) at the time of purchase and the remainder in six (6) equal annual installments, with interest thereon, at the rate of six per cent. (6%) per annum payable annually. In case purchasers or entrymen on lands other than those segregated under the Carey Act, decline to purchase water rights for two years or more after the water is ready for delivery, then One Dollar and Eighty Cents (\$1.80) may be added to the price of the water rights for each year's delay, or fraction thereof. For lands adjacent to and within one mile of the proposed line of railway through said Segregation said second party shall be entitled to receive the price for water rights marked upon the plat of said railway line, filed with the Register of the State Board of Land Commissioners and marked "Exhibit B," the prices thereon ranging from Thirty-eight Dollars (\$38.00) to Thirty-two Dollars (\$32.00) per share for water rights, said rights to be paid for, as follows:

It is agreed that Thirty Dollars (\$30.00) of said price shall be charged as on all other Carey Act lands and that the additional amount shall be added to the last three payments to be made by the purchaser as follows:

On water rights costing Thirty-eight Dollars (\$38.00) per acre, the first of said three payments shall be Two Dollars (\$2.00) additional and the second and third payments Three Dollars (\$3.00) each additional. On water rights costing Thirty-six Dol-

lars (\$36.00) the said additional payments shall be Two Dollars (\$2.00) per annum for each of said three years. On water rights costing Thirty-four Dollars (\$34.00) the first and second additional payments shall be One Dollar (\$1.00) each and the third payment Two Dollars (\$2.00). On water rights costing Thirty-two Dollars (\$32.00) the first and second payments shall be Fifty Cents (\$0.50) and the third payment One Dollar (\$1.00).

Said additional sums above the price of Thirty Dollars (\$30.00) shall not, however, be paid or become due unless the building of said railroad is commenced within eighteen (18) months from this date and completed within five years to a point at least twenty miles distant from the town of Milner, in a westerly direction. No interest is to be charged on such additional amount until the road is built to a point within one mile of the premises to be charged. The total maximum amounts above mentioned are the liens hereby authorized against the legal subdivisions of land to be sold to entrymen.

This agreement shall not, however, be construed to prevent the sale of shares or water rights to purchasers on terms more favorable than those herein provided, or prevent the payment of installments on purchase price in advance of maturity of the same at the option of the purchaser. But in no case shall water rights or shares be dedicated to any lands aforementioned or sold beyond the carrying capacity of the canal or in excess of the appropriation of water therefor.

Transfer of Possession and Management of Canal.

9. It being necessary to provide a convenient method of transferring the ownership and control of said canal from the said party of the second part herein to the purchasers of said water rights in said canal and for determining their rights among themselves and between said purchasers and the party of the second part herein, for the purpose of operating and maintaining said canal during the period of construction and afterwards for the purpose of levying and collecting tolls, charges and assessments for the carrying on and maintenance of said canal and the management and operation thereof, it is hereby provided that as soon as said lands are ordered thrown open for settlement, a corporation, to be known as the North Side Canal Company, Limited, shall be formed at the expense of the party of the second part, the Articles of Incorporation of said Company to be in the form which is herein attached and made a part hereof; that the authorized capital stock of said corporation shall be Two Hundred Thousand (200,000) shares, which amount is intended to represent one share for each acre of land which may hereafter be irrigated from said canal. The entire authorized amount of the capital stock of said corporation shall be delivered to the party of the second part herein in consideration of the covenants and agreements herein contained in order to enable it to deliver to purchasers of water rights the shares of stock representing the same. Said shares of stock, however, shall have no voting power and shall not have force

and effect until they have been sold or contracted to be sold to purchasers of land under this irrigation system.

At the time of the purchase of any water right there shall be issued to the purchaser thereof one share of the capital stock of said corporation for each acre of land entered or filed upon. That the said party of the second part herein shall, in case said water rights or shares of stock are not fully paid for, require the endorsement and delivery to it of said stock, and shall at the same time, require of said purchaser an agreement that until thirty-five per cent (35%) of the purchase price of said stock has been paid the said party of the second part herein shall vote said stock in such manner as it may deem proper at all meetings of the stockholders of said corporation.

But the said second party hereto nor the North Side Canal Company cannot in any manner control any of the said system so as to limit the liability of the said second party under the terms of this contract.

The said North Side Canal Company shall have the management, ownership and control, as above set out, of the said canal system as fast as same is completed and turned over to it for operation by the said party of the second part, as hereinafter provided. Whenever it is certified by the Chief Engineer of the Company and the State Engineer that certain portions of the said canal are completed for the purposes of operation, the same may, with the consent of the Land Board be turned over to the North Side Canal

Company for operation. Such transfer and operation, however, shall not in any manner lessen the responsibility of the said second party with reference to the terms of this contract, nor shall such consent upon the part of the State Land Board be construed as a final acceptance of such portion of such canal, it being always understood that the acceptance of said canal must be in its entirety and that the bond given for the faithful performance of the said contract must be made and be liable for the substantial completion of the entire canal system.

10. The certificates of shares of stock of the North Side Canal Company, Limited, shall be made to indicate and define interest thereby represented in the said system, to-wit: A water right of one-eightieth (1-80) of a cubic foot per second for each acre and a proportionate interest in said canal, and shares based upon the number of shares ultimately sold therein. While the party of the second part shall retain control of said North Side Canal Company, Limited, water shall be measured to users at the place of diversion from the main laterals of such irrigation system in such quantities and at such times as the condition of the crops and weather may determine but according to such rules and regulations, based upon a system of distribution of water to the irrigators in turn and by rotation, as will best protect and serve the interests of all the users of water from said canal system. It is agreed that said system of distribution by rotation shall be devised by said party of the second part and used by the North Side Canal Company, Limited,

(in case the necessity arises) during the period while it retains the management of said North Side Canal Company, Limited, said system of rotation, however, to be approved by the State Engineer. The sale of the water rights to the purchaser shall be a dedication of the water to the lands to which the same is to be applied, such water right to be a part of and to relate to the water right belonging to said irrigation system.

Management of Water and Charges for Delivery.

11. The party of the second part agrees to construct said canal system so that water conducted through the same may be available at a point not to exceed one-half mile, measured in a direct line, from each quarter section of land herein described and to be irrigated and reclaimed by water conducted through said canals. That it will construct and place in position all headgates, flumes, weirs and other devices for the control and measurement of water in the main canals and reservoirs and in the main laterals, it being intended that the settler shall, under the direction of the Chief Engineer of the second party, build and furnish one gate or measuring device for his use, but that all other gates, weirs and measuring devices in the main canals, mains or subordinate laterals shall be furnished and constructed by the second party. Plans for measuring devices, headgates and weirs are to be approved by the State Engineer. No charge shall be made to the purchaser for the delivery of water for lands under the First Segregation, or adjacent thereto, prior to the first day of January, 1909.

For each succeeding year thereafter, while the second party retains the control of the said North Side Canal Company, Limited, said Company may charge and assess the purchasers of water rights in said irrigation system not to exceed the sum of Thirty-five cents (35c) per acre for each acre of land for which a water right has been purchased, said sum to be due and payable on the first day of March of each year. If the sum so raised shall be insufficient for the purpose of maintaining, operating and keeping in repair said system and paying the expenses of the management thereof, then said second party will furnish the additional funds necessary to supply such deficiency.

A main lateral, within the meaning of this contract, is a lateral taken from the main line of the canal. A subordinate lateral, within the meaning of this contract, is a lateral built for the purpose of conducting water from a main lateral to a point within half a mile of the place of intended use. A coulee or draw used as a main lateral or a subordinate lateral shall also be included within these terms.

Completion of System.

12. Said party of the second part agrees to begin work on said irrigation system within one month from the date of this contract, and that it shall be fully completed, so far as covering the First Segregation of land is concerned, within two years from the date hereof. That the construction of said work shall be prosecuted diligently and continuously to completion and that there must be no cessation of work after the first year for more than sixty (60) days without the consent of the Board.

Second party further agrees to have said canal system, so far as it relates to the First Segregation only constructed and in operation in accordance with the contract within two years from the date hereof, it being understood, however, that detailed plans and specifications of said work have not yet been completed, and that said detailed plans and specifications are to be approved by the State Engineer, and that with his consent and the consent of the State Land Board alterations and changes may be made in the plans prepared and filed.

Maintenance of Dam.

13. Inasmuch as the dam at Milner is to be jointly used by the Twin Falls Canal Company, Limited, and the North Side Canal Company, Limited, and is to be jointly owned by them, it is understood and agreed that said Companies shall jointly provide for the management and control of said dam and gates in the canals and dam and shall jointly appoint the person or persons to have charge thereof, and in case of their inability to agree the State Engineer shall appoint a person to take such charge and control, PROVIDED, however, in case of failure or inability of the State Engineer to act, that the State Board of Land Commissioners shall appoint such person. The expenses of the management, operation, repair and control of said dam and gates will be borne by said Companies ratably in proportion to the acres of land under said canals for which water rights are purchased. Forfeited water rights, however, are not to be included in such computation.

Forfeiture.

14. It is agreed that the rights of second party herein may be forfeited in accordance with the laws of the State of Idaho relative to that subject, which are now in force and effect.

Estimated Cost.

15. The estimated cost of the proposed irrigation works is three million dollars (\$3,000,000) and upwards, and the price at which water rights are fixed herein and for which liens are authorized against the separate legal subdivisions of land herein described are deemed necessary in order to pay the costs and expenses of reclamation and interest thereon. The existing laws under which this contract is made are understood and agreed to be a part of this contract.

Description of Lands.

16. The lands hereinbefore referred to are lands donated by the Act of Congress to the State of Idaho under and pursuant to the act approved August 18, 1894, and the amendments relating thereto commonly called the Carey Act, the irrigation and reclamation of which lands this contract is designed to effect. The lands are fully set forth in the list herewith marked "Exhibit A," which is hereby referred to and made a part hereof.

Highways.

17. Entries of land are understood to be made subject to a right of way, without compensation to the entrymen for roads upon all exterior section lines

and also upon all half section lines which may be designated by the Board of County Commissioners as may be provided by law.

Water Supply for Cities and Towns.

18. It is understood and agreed that so much water as may be necessary for the use of cities and towns and the inhabitants thereof, which cities and towns must necessarily take their water supply from said system of canals, shall be furnished from said canal system to said cities and towns and the inhabitants thereof, upon such terms of sale or recital, as may be agreed upon by the party of the second part and said cities and towns or the owners of the lands upon which the same are established, or the residents therein. Said cities and towns must contribute to the maintenance and support of said canal system in proportion to the amount of water used by them, and shares of stock of the North Side Canal Company, Limited, shall be issued for the amounts of water represented by said use to the Trustees of any village or the Mayor of any City, in trust for the use and benefit of the towns and cities and the inhabitants thereof.

Delivery of Water to Users.

19. It is agreed that the said North Side Canal Co., Limited, shall not deliver water to or permit the use thereof from said irrigation system by persons who have not purchased water rights or who are not holders of stock in said North Side Canal Co., Ltd., or who are not otherwise entitled thereto under this contract.

Subsequent Segregations.

20. This contract, in so far as the specifications and plans are concerned, is intended to cover the works necessary for the irrigation of the lands hereinbefore mentioned known as the First Segregation, it being understood that there is now pending an application on the part of the State of Idaho for the Segregation of 155,281.43 acres of land situated in Lincoln County, Idaho, and more particularly described in the List of Lands filed with the Request and Proposal of the Twin Falls Land and Water Co., on the 24th day of December, 1906, which proposal and request were approved by this Board on the 27th day of December, 1906, and also for 3550 acres of land in rejected list No. 14, filed in the Hailey, Idaho Land Office.

It is further understood and agreed that all purchasers of water rights for lands under what is known as the First Segregation obtain a proportionate interest in the entire system of said Twin Falls North Side Land & Water Company, and that this contract is entered into at this time and with reference to the First Segregation, for the reason that the first and second parties hereto do not desire to delay the settlement of portions of said tract which have been segregated for years, and do not wish to await the approval of the segregation of the other portions of said tract; and it is further understood and agreed between the first and second parties hereto that immediately after the approval of the remainder of said

requested segregation they will enter into a specific contract for the reclamation of such segregation, which shall be substantially in the same form as the within contract, the said contract to be considered as a part of the within contract, the two separate instruments to be construed together as one contract covering the entire canal system of the Twin Falls North Side Land & Water Company as shown by the plans, maps and specifications of said system on file in the State Engineer's office.

Mortgage.

The right, title and interest of the second party in the works and irrigation system may be mortgaged, the form of such mortgage to be approved by the Attorney General of Idaho.

Amendments.

This contract may be altered and amended by first party with the consent of the second party for the purpose of carrying out the object of the contract, and for the purpose of meeting any conditions now unforeseen.

IN WITNESS WHEREOF, the said party of the first part, the State of Idaho has by resolution of its State Board of Land Commissioners, caused this agreement to be signed in duplicate by its Governor who is ex-officio President of said Board, and attested by the Register of said Board, and the said party of the second part has hereunto caused its corporate name and seal to be affixed by its Assistant

Secretary under due authority from its Board of Directors the day and year first herein written.

FOR THE STATE OF IDAHO.

(Signed) F. N. Gooding, Governor.

Attest: (Signed) M. I. Church, Register.

State Board of Land Commissioners.

TWIN FALLS NORTH SIDE LAND AND
WATER COMPANY,

By (Signed) Jerome Hill, Jr.,

(Seal.)

Asst. Sec.

Endorsed: Filed Oct. 29, 1915. W. D. McReynolds, Clerk.

EXHIBIT "F."

Office of the State Engineer,

Boise, Idaho, August 12, 1907.

To the Honorable State Board of Land Commissioners, State Capitol, Boise.

Gentlemen:—

Pursuant to the provisions of Section Nine of Chapter 11 of House Bill 143 (Sess. Laws, 1899 p. 286) approved on the second day of March, 1899, I have the honor to submit the following report on the proposal of George F. Sprague, C. B. Hurtt, H. L. Hollister and I. B. Perrine, relative to the segregation, reclamation and irrigation of certain lands, now a part of the public domain, said lands hereinafter described, being subject to segregation under the provisions of the Act of Congress approved August 18, 1894, entitled "An Act making appropriations for

sundry civil expenses of government for the fiscal year ending June 30, 1895, and for other purposes," (28 Stat. 372-422), and other acts amendatory thereof.

The Lands, for which segregation is sought in the above mentioned proposal, are arid in character as contemplated in the Acts of Congress above cited and comprise 150,000 acres lying in townships 10 to 14 south inclusive and within ranges 14 and 18 east inclusive, Boise base and meridian. The northern line of the tract is contiguous to the southern line of the Twin Falls tract, the soils of the two being of the same general character as to fertility and certain productiveness under irrigation. The general topography and natural facilities for irrigation are all that could be asked for.

The Water Supply will be taken from the Salmon River, the proposers holding a permit from this office to divert 1500 cubic feet per second of time from that stream, together with all storm and flood waters. The Salmon River above the point of intended diversion has a drainage area of about 1750 square miles, a good portion of which lies in the mountains where very heavy falls of snow occur each year. The waters available for the enterprise are unquestionably adequate for the purpose in hand and the right of the proposers is most excellent, legally considered, all adverse priorities being so small in the aggregate as to be negligible.

The Proposed Works will consist of a reservoir and

diversion dam, tunnel, canals and laterals necessary to deliver water to within one-half mile of each 160 acre tract of the lands to be irrigated. The dam will be located at a point where the Salmon River enters the canyon near the east line of Sec. 18, T. 14 S. R. 15 E. B. M. It is estimated that by means of this dam together with supplementary storage to be developed if necessary, over 400,000 acre feet of water can be impounded annually. The normal flow of the river will prove sufficient for all purposes probably until the middle of July, after which time the reservoir supply will be drawn on.

The Estimated Cost which has been fixed at \$3,000,000.00 is, I believe, fairly correct. This includes the building of the reservoir dam tunnel, and all canals and laterals necessary to deliver water to within one-half mile of each 160 acre subdivision in the tract. A charge of \$35.00 per acre for water rights under this project would, I believe, be justified, owing to the expense to be incurred in transporting materials to the reservoir site which is about 40 miles from the nearest available railroad point. Should the plans of the proposers now under foot for the building of a railroad through the tract be realized, I believe that a charge of \$40.00 per acre for water rights would be reasonable.

In conclusion I would say that, in my opinion, the project in question is one of unusual merit, and will prove a noteworthy success and a goodly increase to the irrigated area of the State, in the event of favor-

able consideration by your Honorable Board and the Honorable the Secretary of the Interior.

Respectfully submitted,

JAMES STEPHENSON, JR.,

State Engineer.

State of Idaho,

County of Ada,—ss.

I, Heber Q. Hale, Register of the State Board of Land Commissioners of the State of Idaho, do hereby certify that the above and foregoing is a true and correct copy of report of State Engineer under date of August 12, 1907, on file in my office, relative to the Twin Falls Salmon River Project.

In witness whereof, I have hereunto set my hand and affixed the official seal of the State Board of Land Commissioners this 28th day of October, 1915.

(Seal.) HEBER Q. HALE, Register.

Endorsed: Filed Oct. 29, 1915. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

MEMORANDUM DECISION ON APPLICATION
OF DEFENDANT TO REOPEN CASE.

Nov. 3, 1915:

C. O. Longley and W. E. Golden, Attorneys for Plaintiffs.

Richards & Haga, S. H. Hays and P. B. Carter, Attorneys for Defendant.

Dietrich, District Judge:

The application is to have the case reopened for the introduction of testimony tending to explain the

terms and conditions of the contract which is the basis of the suit, on the theory that it is ambiguous. There is no showing of inadvertence or surprise, nor is it contended that the evidence which it is sought to introduce is newly discovered. The affidavit attached to the application sets forth in somewhat general terms the line of testimony which it is desired to offer, and this more or less directly relates to the issue, but it is doubtful whether, if the facts suggested and none other, were admitted to be true, they could be given effect. There is no showing that such facts were known to the settlers or water users who are parties to the contract in question, and of course facts of which a party is ignorant do not tend to throw any light upon the purpose or intent with which he acted. But entirely aside from this consideration, I do not think it would be proper now to reopen the issue. It would set a precedent for a very dangerous practice. While there was some doubt during the course of the trial as to what relief the court could grant, it must have been understood, and the record shows that it was understood, that whatever disposition was made of the case the court must first construe the contract; its meaning was the fundamental issue. The question was argued preliminarily, it became the subject of frequent discussion during the course of the hearing, and it was most elaborately briefed upon the submission of the cause. Now if under these circumstances the court can with propriety reopen the issue there might be no end to a suit. Upon being advised of the views and conclusions of the court, the losing

party almost invariably feels that he could strengthen his case if he had another chance. Here it was from the beginning the right and duty of the parties to throw such light as they thought available, upon the meaning of the contract, for, as already stated, that was a plain and inevitable issue. Having been content to submit the case as made, both parties are now bound.

For these reasons the application must be denied, and an order will be entered accordingly.

Endorsed: Filed Nov. 3, 1915. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

INTERLOCUTORY DECREE.

This cause coming on to be heard at this term of this court and having been duly presented, thereupon, on consideration thereof, it is ORDERED, ADJUDGED and DECREED as follows:

That the defendant Twin Falls Salmon River Land & Water Company contracted with the State of Idaho and with the settlers holding agreements for the purchase and sale of water rights that it, the said defendant, would provide a system of canals and reservoirs on what is known as the Salmon River Project, in Twin Falls County, State of Idaho, which in ordinary seasons would furnish a supply of water for irrigation purposes sufficient for the acreage covered by such settlers' agreements at the rate of two and three-fourths acre feet per acre, measured at the points of delivery from the system into the consum-

ers' laterals; and further that it would not sell rights in excess of such available supply. That the said defendant be restrained from making additional contracts for the sale of water rights and also from waiving the right to forfeit any existing contract. That the said defendant and the Commonwealth Trust Company of Pittsburgh, a corporation, Trustee, and A. C. Robinson be, and each of them is, hereby enjoined and restrained from collecting or attempting to collect, or from enforcing payments upon said water right agreements, including any overdue payments or installments on said agreements, until such time as the holders thereof have been provided with the water supply so contracted for, or are given trustworthy assurance, to be approved by the court, that said water will be provided, or until the further order of this court.

It is further ordered and decreed that jurisdiction be retained for the purpose of making final disposition of the cause, and leave is hereby granted to either party to make application at any time for the introduction of further proof touching the available water supply, and more particularly relating to (1) the amount and dignity of the rights awarded to adverse claimants in the suit of Twin Falls Salmon River Land & Water Company, et al., v. Vineyard Land & Stock Company, now pending in this court, and numbered 405; (2) seepage in the reservoir basin and the canal system; and (3) the aggregate amount of water agreements actually outstanding at

the time of such application, and upon the submission of such proof for the entry of final decree.

Dated this 29th day of November, 1915.

FRANK S. DIETRICH,

Judge.

Endorsed: Filed Nov. 29, 1915. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

And Now Come the defendants, Twin Falls Salmon River Land & Water Company, Salmon River Canal Company, Limited, Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, and having presented an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree made and entered in the above entitled cause on the 29th day of November, 1915, say that said decree, made and entered as aforesaid, and the decision made and filed by the Court in this cause on the 29th day of June, 1915, are erroneous and unjust to these defendants, and particularly in this:

1. Because the Court erred in holding, decreeing and deciding that the said defendant, Twin Falls Salmon River Land & Water Company, had in its contract with the State of Idaho or in its contracts with the settlers, agreed to furnish water at the rate of $2\frac{3}{4}$ acre feet per acre measured at the points of delivery of the system into the consumers' laterals.

2. Because the Court erred in holding, decreeing and deciding that the defendant, Twin Falls Salmon

River Land and Water Company, had agreed in its contract with the State of Idaho, or in its contracts with the settlers under its irrigation system, that it would not sell water rights in said irrigation system in excess of its ability to deliver $2\frac{3}{4}$ acre feet of water per acre measured at the points of delivery from the system into the consumers' laterals.

3. Because the Court erred in holding, decreeing and deciding that the defendant, Twin Falls Salmon River Land and Water Company and the Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, and each of them, be enjoined and restrained from collecting or attempting to collect, or from enforcing payment under any contract executed by said Twin Falls Salmon River Land and Water Company for the sale of water rights in the irrigation system constructed by said Company.

4. Because the Court erred in holding, decreeing and deciding in effect that the complainants and other settlers under said irrigation system are entitled to receive water from said irrigation system without making any payments of either principal or interest on their said contracts until such time as the defendants have provided a water supply sufficient to deliver to such settlers $2\frac{3}{4}$ acre feet per acre, measured at the points of delivery of the system into the consumers' laterals.

5. Because the Court erred in enjoining and restraining the defendants, Twin Falls Salmon River Land and Water Company, Commonwealth Trust

Company of Pittsburgh, as Trustee, and A. C. Robinson, from collecting, or attempting to collect or enforce payment of overdue installments of principal and interest under said contracts, and from collecting any sum whatsoever from the settlers for water heretofore or hereafter delivered to such settlers until said defendants have provided for such settlers $2\frac{3}{4}$ acre feet per acre, or given trustworthy assurance to be approved by the Court that such water will be provided.

6. Because the Court erred in holding and deciding that the Twin Falls Salmon River Land and Water Company had issued, or caused to be issued or circulated, a printed circular introduced in evidence as "Plaintiffs' Exhibit 17."

7. Because the Court erred in holding and deciding that the form of contract used in the sale of water rights under the irrigation system of the defendant Twin Falls Salmon River Land and Water Company, being "Plaintiffs' Exhibit C," was prepared by the Company, and that such contract should be construed more strongly against the defendants than against the settlers.

8. Because the Court erred in holding, deciding and decreeing that plaintiffs and other settlers under said irrigation system were entitled to receive more than their pro rata or proportionate share of all water available for distribution from such irrigation system, and that the defendant Twin Falls Salmon River Land and Water Company had in any way agreed or warranted that each settler should receive

2¾ acre feet of water per acre or any other specified amount in excess of his proportionate share of all water available for distribution from said irrigation system.

9. Because the Court erred in holding and deciding that if the settlers' contracts be not construed to require the Company to deliver a specific amount of water per acre, that the Company would be free to sell water rights and undivided interests in said irrigation system without limit.

10. Because the Court erred in holding and deciding that the duty of water or the amount of water required per acre under the irrigation system of the defendant Twin Falls Salmon River Land and Water Company was immaterial.

11. Because the Court erred in declining to consider or admit in evidence the testimony of C. H. Poston, John C. Boren, Joseph Boren, W. M. Worthington, W. T. Holt, J. P. Holmbran, C. J. Griffith, J. S. Welch, J. C. Wheelon, W. G. Sloane, William Wayman, E. B. Darlington, C. C. Thom, A. P. Senior and John Krall, witnesses called by defendants, which testimony was offered for the purpose of showing that the amount of water claimed by the plaintiffs in the bill is unnecessary and is not needed or required for the necessary or proper irrigation of the lands in question; also that the use of the amount of water claimed by the plaintiffs in the bill would be excessive and would be injurious to and impair the value of the lands in question and also that the existing water supply is sufficient for the irrigation of all of

the valid existing land entries upon the tract and that the plaintiffs have not and will not be harmed by any alleged insufficiency of the water supply.

12. Because the Court erred in striking out the evidence of the witness H. M. Sims relative to the making of final proof under the Carey Act and as to the statements made in connection therewith.

13. Because the Court erred in holding and deciding that it is no concern of the defendants that the settler may use water wastefully or to an amount in excess of his reasonable needs.

14. Because the Court erred in holding and deciding that the terms of the agreement here involved were fixed by the defendant Twin Falls Salmon River Land and Water Company, and not by the settler or other party to such agreement.

15. Because the Court erred in holding and deciding without any evidence in support thereof, that at the time the contracts in question were executed, "water rights were customarily appropriated, decreed, contracted for, and sold, as definite quantities, and, with rare, if any exceptions, the amount deemed to be necessary, both popularly and by the Courts, exceed the amount here provided for."

16. Because the Court erred in holding and deciding that the Company had entered into contracts to deliver an amount of water in excess of the capacity of the system, but failed or declined to determine the amount of such excess or the acreage to which the same should be limited.

17. Because the Court erred in failing to enter an enforceable decree or a final decree finally determining and settling the rights of the parties.

18. Because the Court erred in overruling the motion of the defendant Twin Falls Salmon River Land and Water Company to dismiss.

19. Because the Court erred in holding and deciding that it has jurisdiction to proceed with the trial of the cause until all parties interested in the controversy had been brought before the Court and made parties to the cause.

20. Because the Court erred in not dismissing the bill because of the absence of indispensable parties.

21. Because the Court erred in entering any decree in this cause in favor of plaintiffs.

22. Because the decision of said Court is contrary to and in conflict with the laws of the State of Idaho as construed by its highest Court, particularly Sections 1615 to 1629, inclusive, of the Revised Codes of Idaho.

23. Because the decision of said Court and the decree entered herein are contrary to and in conflict with the decision of the Supreme Court of the State of Idaho, construing such contracts and the laws of the State of Idaho under which such contracts were entered into and said irrigation system constructed and water rights acquired, and the same are particularly in conflict with the following decisions of said Supreme Court:

State ex rel West v. Twin Falls Canal Co.,
21 Idaho 410, 121 Pac. 1039.

State v. Twin Falls Canal Co., 151 Pac.
1013.

Idaho Irrigation Co. v. Lincoln Co., et al.,
152 Pac.

Wherefore, the said defendants pray that the decree entered herein, be reversed and set aside, with directions to said District Court to dismiss plaintiffs' bill.

S. H. HAYS,

Solicitor for Twin Falls Salmon River Land and Water Company.

P. B. CARTER,

Solicitor for Salmon River Canal Company, Limited.

RICHARDS & HAGA,

Solicitor for Commonwealth Trust Company, Trustee, and A. C. Robinson.

Endorsed: Filed Dec. 9, 1915. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

PETITION FOR APPEAL.

And Now Come the defendants, Twin Falls Salmon River Land and Water Company, a corporation, Salmon River Canal Company, Limited, a corporation, Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, and conceiving themselves aggrieved by the decree made and entered on the 29th day of November, 1915, in the above cause, and by the decision of the Court rendered herein on

the 29th day of June, 1915, do hereby appeal from said decree and decision, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith; and the said defendants pray that this, their appeal, may be allowed and that citation issue as provided by law, and that a transcript of the record, evidence, proceedings and papers upon which said decree and decision were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

S. H. HAYS,

Solicitor for Twin Falls Salmon River Land and Water Company.

P. B. CARTER,

Solicitor for Salmon River Canal Company, Limited.

RICHARDS & HAGA,

Solicitors for Commonwealth Trust Company, Trustee, and A. C. Robinson.

ORDER ALLOWING APPEAL.

And Now, to-wit, on this 9th day of December, 1915, *It Is Ordered* that the foregoing petition be granted, and that the appeal be allowed as prayed for, and that the said defendants and petitioners file a bond on appeal in the sum of Five Hundred Dollars (\$500.00), with good and sufficient surety, to be approved by the Court.

FRANK S. DIETRICH,

District Judge.

Endorsed: Filed Dec. 9, 1915. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

BOND ON APPEAL.

Know All Men by These Presents, That we, Twin Falls Salmon River Land & Water Company, Salmon River Canal Company, Limited, the Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, as principal, and the Boise Title and Trust Company, a corporation, as surety, are held and firmly bound unto the complainants named in the above-entitled cause, in the just and full sum of Five Hundred Dollars (\$500.00) for the payment of which, well and truly to be made, we bind ourselves, and each of us, and our and each of our heirs, executors, administrators, successors and assigns firmly by these presents.

Sealed with our seals and dated this 11th day of December, 1915.

The condition of this obligation is such, that,

Whereas, the above-named Twin Falls Salmon River Land & Water Company, Salmon River Canal Company, Limited, Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, defendants, have prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree made and entered on the 29th day of November, 1915, and also from the decision of the Court rendered therein on the 29th day of June, 1915, in the above-entitled cause, in the District Court of the United States for the District of Idaho, Southern Division.

Now, Therefore, If the above-named defendants,

Twin Falls Salmon River Land & Water Company, Salmon River Canal Company, Limited, Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, shall prosecute their said appeal to effect and answer all costs, if they shall fail to sustain their said appeal, then the above obligation shall be void, otherwise the same shall be and remain in full force and virtue.

In Witness Whereof, The said principals, Twin Falls Salmon River Land & Water Company, the Salmon River Canal Company, Limited, the Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, have hereunto caused their names to be subscribed by their solicitors of record, and the said surety, the Boise Title and Trust Company, a corporation, has caused its name to be hereunto subscribed by its duly authorized officers, and its corporate seal affixed, the day and year first above written.

TWIN FALLS SALMON RIVER LAND &
WATER COMPANY, By S. H. Hays,
Its Solicitor.

SALMON RIVER CANAL COMPANY,
LIMITED, By P. B. Carter,
Its Solicitor.

COMMONWEALTH TRUST COMPANY
OF PITTSBURGH, TRUSTEE,
By Richards & Haga,
Its Solicitor.

A. C. ROBINSON,
By Richards & Haga,
His Solicitor.

BOISE TITLE AND TRUST COMPANY,

(Seal)

By S. H. Hays,

Attest:

President.

W. J. ABBS,

Secretary.

Approved this the 11th day of December, 1915.

FRANK S. DIETRICH,

District Judge.

Endorsed: Filed Dec. 11, 1915.

W. D. McReynolds, Clerk.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

IN EQUITY—No. 494.

A. E. CALDWELL, W. F. MIKESELL, V. E. MOR-
GAN, J. E. POHLMAN, W. C. POND, JAMES
W. BEAUCHAMP, CARL WASHBURN and
HAROLD M. SIMS, in their own behalf and in
behalf of all persons similarly situated with them,

Complainants,

vs.

TWIN FALLS SALMON RIVER LAND AND
WATER COMPANY, a Corporation, SALMON
RIVER CANAL COMPANY, LIMITED, a Cor-
poration, COMMONWEALTH TRUST COM-
PANY OF PITTSBURGH, TRUSTEE, and A. C.
ROBINSON,

Defendants.

CITATION.

*The President of the United States to the above-
named complainants, A. E. Caldwell, W. F. Mikesell,*

V. E. Morgan, J. E. Pohlman, W. C. Pond, James W. Beauchamp, Carl Washburn and Harold M. Sims, and all others similarly situated, and to C. O. Longley, Esq., their attorney, greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to an appeal, filed in the Clerk's office of the District Court of the United States for the District of Idaho, Southern Division, wherein A. E. Caldwell, W. F. Mikesell, V. E. Morgan, J. E. Pohlman, W. C. Pond, James W. Beauchamp, Carl Washburn, and Harold M. Sims, are complainants, and Twin Falls Salmon River Land and Water Company, Salmon River Canal Company, Limited, Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, are defendants, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Witness, the Honorable Frank S. Dietrich, Judge of the United States District Court for the District of Idaho, Southern Division, this the 11th day of December, 1915.

FRANK S. DIETRICH,

Judge of the United States District Court for the District of Idaho, Southern Division.

Service of the within Citation and receipt of copy

thereof admitted this the 16th day of December, 1915.

C. O. LONGLEY,

Attorney and Solicitor for the Appellees, A. E.

Caldwell, W. F. Mikesell, V. E. Morgan, J. E.

Pohlman, W. C. Pond, James W. Beauchamp,

Carl Washburn and Harold M. Sims.

Endorsed: Filed Dec. 17, 1915.

W. D. McReynolds, Clerk.

RETURN TO RECORD.

And thereupon it is ordered by the Court, that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and the same is transmitted accordingly.

(Seal)

Attest: W. D. McREYNOLDS,

Clerk.

(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I, W. D. McREYNOLDS, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 408 inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, in accordance with praecipe on file herein, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$477.30, and that the same has been paid by the appellant.

Witness my hand and seal of said Court, affixed at Boise, Idaho, this 31st day of December, 1915.

W. D. McREYNOLDS,

Clerk.